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No. 92-___

In The

Supreme Court of the United States

October Term, 1992

TIMES PUBLISHING COMPANY, MIAMI HERALD PUBLISHING COMPANY, and STATE OF FLORIDA,

Petitioners,

v.

JOHN LEWIS RUSSELL, III,

Respondent.

Petition For A Writ Of Certiorari To The District Court Of Appeal Of Florida, Fifth District

PETITION FOR WRIT OF CERTIORARI

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162 pp

QUESTIONS PRESENTED FOR REVIEW

I. Whether the First and Fourteenth Amendments to the United States Constitution provide a qualified right of public access to judicial records of completed criminal prosecutions?

II. If so, whether courts may order entire court files sealed without setting forth specific factual findings on a case-by-case basis that sealing the records (a) serves a compelling governmental interest, (b) will be effective in protecting that interest, and (c) is no broader than necessary to protect that interest?

III. Whether courts may require members of the public seeking access to judicial records in criminal cases where no such findings ever were made to bear the burden of demonstrating by evidence why access to the records serves the public interest?

RULE 29.1 STATEMENT

Petitioner Miami Herald Publishing Company, publisher of the daily newspaper *The Miami Herald*, is a division of Knight-Ridder, Inc.

Petitioner Times Publishing Company, publisher of the daily newspaper the *St. Petersburg Times*, is a subsidiary of Times Holding Co., Inc., which is itself a subsidiary of Poynter Institute for Media Studies, Inc. Times Publishing Company's subsidiaries are Congressional Quarterly, Inc., Trend Magazines, Inc., and Modern Graphics, Inc.

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No. 92-___

In The

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October Term, 1992

TIMES PUBLISHING COMPANY, MIAMI HERALD PUBLISHING COMPANY, and STATE OF FLORIDA,

Petitioners,

v.

JOHN LEWIS RUSSELL, III,

Respondent.

Petition For A Writ Of Certiorari To The District Court Of Appeal Of Florida, Fifth District

PETITION FOR WRIT OF CERTIORARI

Petitioners, Times Publishing Company, Miami Herald Publishing Company, and the State of Florida, respectfully pray this Honorable Court for a Writ of Certiorari to review the decision of the District Court of Appeal of Florida, Fifth District, reversing a trial court order unsealing court files reflecting criminal prosecutions of Respondent, John Lewis Russell, III.

OPINIONS BELOW

The decision of the Florida Fifth District Court of Appeal is reported at 592 So. 2d 808 (Fla. Dist. Ct. App. 1992), and is reprinted in the Appendix to this Petition at

A4-7.[1] On March 11, 1993, after full briefing on the merits, the Florida Supreme Court declined jurisdiction of the case. The Florida Supreme Court's decision is reported at 615 So. 2d 158 (Fla. 1993), and is reprinted at A1-3. The order of the Honorable George A. Sprinkel, IV, Circuit Judge of the Ninth Judicial Circuit Court of Florida, unsealing the judicial records at issue, is not reported but is reprinted at A8-13.

JURISDICTION

The Florida Supreme Court dismissed the petition for review of the Fifth District Court of Appeal's decision by order dated March 11, 1993. The order prohibited motions for rehearing. A3. This petition is docketed within 90 days from the entry of that order. Petitioners invoke this Court's jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

First Amendment, United States Constitution:

"Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."

Fourteenth Amendment, United States Constitution:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

Florida Statutes § 901.33 (1979), entitled "Arrest records; expunging; exceptions."[2]

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[1] References to the Appendix are designated "A___."

[2] The statute is lengthy and is set forth in the Appendix at A105-106 pursuant to United States Supreme Court Rule 14.1(f) and (k).

Florida Statutes § 943.058 (Supp. 1980), entitled "Criminal history record expunction or sealing."[3]

Florida Rule of Criminal Procedure 3.692.[4]

STATEMENT OF THE CASE

A Florida statute in effect in various forms since 1974 has purported to require or permit the state courts to seal or "expunge" judicial records of criminal prosecutions with absolute, unbridled discretion. The societal interests and values, made plain by this Court, protected by the First Amendment, have been swept aside by the Florida courts in applying this statute. The dangers inherent in unrestrained judicial secrecy are vividly demonstrated by this case.

A. Statement of Facts.

Respondent John Lewis Russell, III, has a criminal history which includes at least six arrests on charges including grand theft, possession of a concealed firearm, and possession of cocaine. Nevertheless, Respondent is licensed as a private investigator in the State of Florida and is the founder and chief executive officer of the Bureau of Missing Children, Inc., a Florida charity which solicits monetary donations from the public. As of 1989, the Respondent's charity had collected in excess of a million and a half dollars through "phone room operations, basically cold call solicitors. We are talking about boiler rooms." A88-89. However, as a result of a Florida statute, all criminal court files concerning Respondent have been sealed by court order.

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[3] The statute is lengthy and is set forth in the Appendix at A106-110.

[4] The two versions of the Rule, setting forth procedures pertaining to Fla. Stat. § 901.33 (1979) and, subsequently, Fla. Stat. § 943.058 (Supp. 1980), are lengthy and are set forth in the Appendix at A110-114.

The following facts are known about Respondent's criminal history.[5] In 1979, Respondent was arrested in a Tampa, Florida convenience store on the felony charge of carrying a concealed firearm. As a felony conviction would have jeopardized his private investigator's license, Respondent pled *nolo contendere* to a misdemeanor charge of carrying a concealed weapon in the Thirteenth Judicial Circuit Court in and for Hillsborough County, Florida. The court withheld adjudication and Respondent was placed on probation. In February 1980, represented by attorney Richard Blunt, Respondent filed with the court a "motion to expunge" all official records relating to his arrest, including the court files.[6] Two separate orders sealing or "expunging" the felony and misdemeanor law enforcement records and court files were entered on June 6, 1980 and October 3, 1980, by The Honorable Perry Little, County Court Judge, and The Honorable Harry Lee Coe, Circuit Judge, respectively.[7] A77-79, 94.

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[5] Although the court files concerning Respondent's prosecutions remain sealed, Respondent and several courts set forth these facts in the course of various related proceedings below. *See* A77-83; 86-91; 93-94. The appellate courts below have denied motions to include the sealed court files in the record on appeal, even if maintained under seal.

[6] The authority Respondent has asserted for this motion was Fla. Stat. § 901.33 (1979), which was effective until October 1, 1980, when it was repealed and replaced by Fla. Stat. § 943.058 (1980). Section 901.33 provided that a person never convicted of a criminal offense, if charged with a crime but acquitted or released without adjudication of guilt, could thereafter move the court to "expunge the record of arrest," upon notice to the prosecuting and arresting authorities. It further provided, "The court *shall issue* an order to expunge all official records relating to such arrest, indictment or information, trial, and dismissal or discharge." *See* A105-106 (emphasis added).

[7] Respondent's actual motion has never been revealed nor, to Petitioners' knowledge, have the court's orders. However, as the Florida Supreme Court had construed section 901.33 in *Johnson v. State*, 336 So. 2d 93 (Fla. 1976), under state "separation of powers" doctrines the statute could not require or allow for the actual *destruction* of court files (the literal meaning of "expunction") but only for the sealing of such files.

In 1981 Respondent was again arrested in Tampa on a grand theft charge, which was later dismissed. Again represented by Mr. Blunt, Respondent filed a motion to withdraw all records from public view pursuant to the version of Florida's sealing and expunction statute in effect since October 1, 1980, Fla. Stat. § 943.058 (Supp. 1980). *See* A106-110.[8] The Honorable J. Rogers Padgett, Thirteenth Judicial Circuit Judge, entered an order sealing judicial records and sealing or directing destruction of non-judicial records of the arrest on July 6, 1982. A79-81, 94.

In 1984, Respondent again was arrested, this time on felony charges of possession of cocaine and possession of drug paraphernalia. Prosecutors issued a Letter of Release to Respondent in connection with the charges, and he obtained an order sealing the judicial records on December 4, 1984, which order also withdrew from public view, by sealing or destruction, non-judicial records including those of the Tampa Police Department. A81-82, 94.

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[8] In recognition of the Florida Supreme Court's holding in *Johnson v. State, supra*, that the Legislature could not direct destruction of judicial records consistent with Florida's separation of powers doctrine, the new sealing and expunction statute said that the sealing and expunction of court records was within the "jurisdiction" of the courts. As to the sealing and expunction of non-judicial criminal history records, the new statute set forth four requirements which remain unchanged to this day: (a) no previous adjudications of guilt; (b) no adjudication of guilt on charges to which the sealing or expunction motion pertains; (c) no prior sealings or expunctions; and (d) no expunctions (destructions) allowed until the records have been sealed for 10 years unless the defendant was not charged by indictment or information. Florida Department of Law Enforcement records could not be expunged unless the court found "unusual circumstances," in addition to requirements (a) through (d). *See* Fla. Stat. § 943.058(2)(a)-(d) and (3) (Supp. 1980). Section 943.058 remained in effect unchanged until 1988, when a provision was added to indicate that sealings and expunctions of any criminal history records, including non-judicial records, were not a matter of right for former defendants, but could be denied in the court's discretion.

In March of 1989, Petitioner Miami Herald Publishing Company ("the Herald") filed in the Florida Thirteenth Judicial Circuit Court its motion to intervene and unseal the criminal court files relating to Respondent on the grounds, *inter alia*, that the orders did not comport with the First and Fourteenth Amendments to the United States Constitution.[9] Circuit Judge Harry Lee Coe heard the motion, consolidated Respondent's four cases for this purpose, and ruled that the court had "abused its discretion" in sealing the 1981 and 1984 court files and in expunging the law enforcement records of those arrests.[10] The Herald contended a qualified First Amendment right of access attached to all three court files. The only argument advanced by Respondent in support of the orders sealing the court files was that he "qualified" for this relief under Florida's sealing and expunction statute.[11] Respondent appealed to the Florida District Court of Appeal for the Second District, and again advanced only

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[9] The Herald filed this motion in connection with an investigative news story concerning the Bureau of Missing Children. In its news story, the Herald reported that a substantial portion of the $1.5 million collected by the Bureau, which had offices in seven Florida cities, was embezzled by the convicted felons and crack cocaine addicts hired to staff its telephone boiler rooms. Most of the money collected that was not embezzled went to pay salaries and overhead. The story warned that Florida citizens could not rely on the state to police such activities. Stated one former head of the Florida Division of Licensing in Tallahassee, "Not only is regulation in Florida poor, it's virtually non-existent." A67-76.

[10] A84-91, 92-100. The trial court denied Respondent's motion to require the Herald to reveal the source of the information about his sealed criminal charges and to hold it in contempt of court for having published information relating to his Tampa criminal history. A92-100.

[11] Respondent argued, in effect, that Fla. Stat. § 943.058(3) (Supp. 1980), addressing FDLE records, was a "bonus section" in that it accorded a right to a sealed court file to those persons not meeting the requirements of § 943.058(2)(a)-(d). Clearly, Respondent did *not* meet the requirements: he had already obtained relief under the prior version of the statute, § 901.33. As it turned out, little did the court know *how much relief* he had already obtained.

his "entitlement" under Florida's statute in support of the sealings and expunctions.[12]

On July 6, 1990, the Second District Court of Appeal reversed the order unsealing the court files but held that "henceforth" in considering requests to seal judicial records, "in order for section 943.058 to be constitutional," courts should apply the three-part test established by this Court in *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986) ("*Press-Enterprise II*"), for sealing of court records or proceedings generally.[13] However, the Second District further held that, because Russell's court files had been sealed for several years, *his* sealing orders, even as to judicial records, were entitled to a "presumption of correctness."[14] The court created a "modified" *Press-Enterprise* test, in which the burden of proof falls upon the proponent of access, for unsealing court files sealed pursuant to Fla. Stat. § 943.058. In order to unseal such files, a proponent of access was required to show: (1) vacation of the expunction order would serve the public interest; (2) there is a "substantial probability" that, in absence of vacation of the closure order, the public interest would be harmed; and (3) no less restrictive alternatives are available.[15] The court then remanded the case to the trial court for application to the court files

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[12] The Herald appealed the trial court's refusal to unseal the court's records concerning Russell's 1979 firearm arrest.

[13] *Russell v. Miami Herald Publishing Co.*, 570 So. 2d 979, 982 (Fla. Dist. Ct. App. 1990); A99.

[14] The orders could hardly have been more incorrect under *Press-Enterprise II* or the statute.

[15] *Russell*, 570 So. 2d at 983; A99-100. The Florida Second District's "unsealing" test turns this Court's First Amendment jurisprudence on its head, creating a "test" nearly in the nature of a non sequitur. The decision rejected Petitioner's argument that a qualified right of access existed under the First and Fourteenth Amendments, because where that right exists, so does a presumption in favor of openness, not closure.

of the new "unsealing" test.[16] On remand, the Tampa trial court refused to unseal any of the court files concerning Respondent, and the Herald again appealed to the Second District Court of Appeal.[17]

B. The Proceedings Below.

In the Spring of 1991, well after the Tampa trial court's initial and remand hearings, and some months after the second round of appeals had been under way, Petitioners discovered that in addition to the sealed files in Tampa, Respondent had obtained three *other* sealing orders, sealing court files of three *other* incidents of arrest in the jurisdiction of the Florida Circuit Court for the Ninth Judicial Circuit (Orlando, Florida). On May 9, 1991, Petitioners the Times and Herald filed a motion in the Ninth Judicial Circuit seeking an order unsealing all Ninth Circuit Court files relating to Respondent. A14-33. The motion was captioned *"State of Florida v. John Lewis Russell, III"* and bore only one case number, "77-1096." A14. It sought access to the court's records of criminal proceedings against Respondent, *inter alia*, based on the First Amendment principles set forth in *Press-Enterprise v. Superior Court*, 478 U.S. 1 (1986).[18]

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[16] The Second District also reversed that portion of the trial court's order unsealing non-judicial records because the Miami Herald's motion was directed only to court records. *Russell*, 570 So. 2d at 983; A92-100.

[17] The case is presently pending as Case No. 90-03242. A separate motion filed by Petitioner Times Publishing Company ("Times") shortly after the remand hearing is also the subject of an on-going appeal in the Second District, in its Case No. 91-00630. The Times' motion sought vacation of the Tampa court's orders to the extent that they sealed or expunged the records in the hands of law enforcement agencies other than the court relating to Respondent's 1979, 1981 and 1984 Tampa arrests.

[18] The Times and Herald pointed out that Respondent had conceded he had obtained orders sealing four criminal court files in the Florida Thirteenth Judicial Circuit; the Ninth Judicial Circuit's records may reflect at least three additional sealing orders; and the existence of sealed files in Orlando never before had been disclosed by Respondent

At the hearing on Petitioners' motion, in which the State of Florida joined, the court had physical possession of two case files, numbered CR-77-1096 and CR-75-3275. The court announced from the bench that CR-77-1096 concerned a 1977 grand theft charge and CR-75-3275 concerned a 1975 charge of obtaining property by worthless check. According to the court, both of these cases were sealed pursuant to an order dated February 4, 1980. A36, 46.[19]

Respondent, through counsel, admitted the Orlando sealings had not been brought to the Tampa courts' attention during the Thirteenth Circuit and Second District proceedings on the newspapers' motions for access to the Tampa files and records, but argued, again based solely on Florida's sealing and expunction statute, that Respondent was "entitled" to the sealing orders, Respondent had no obligation to disclose the three Ninth Circuit sealings, because "the beauty of it, your Honor, is that the law permits me to do that." A37.[20] In addition, Respondent's attorney admitted Respondent had *never specifically* revealed the existence of the Orlando sealings to the

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at any stage of the then two-year-old proceedings on the Tampa sealed files. A copy of the motion and notice of a May 20, 1991 hearing before the Honorable George A. Sprinkel, IV were served on Respondent's counsel, Mr. Blunt. A14-34.

[19] Notably, the order sealing these files was entered *the same month* Respondent filed his *first* motion to expunge in Tampa. A78. The third Orlando file, believed to concern a firearm charge, had not been located at the time of the Orlando hearing, and its case number was unknown to the court. A36.

[20] Again, section 901.33, as it appeared unchanged in pertinent part from its enactment in 1974 up to October 1, 1980, purported to *require* issuance of "an order to expunge all official records" of the arrest, including indictments, informations, *trials*, dismissals and "discharges," upon the showing that the defendant was acquitted or released without an adjudication of guilt. The statute further stated the recipient of relief was not guilty of perjury for failing to "recite or acknowledge such arrest in response to any *non-judicial inquiry*." *See* A105-106.

Tampa trial courts on the numerous occasions Respondent sought sealing and expunction orders from the Tampa courts, where at least with regard to the sealing orders entered in 1980 and 1982, Respondent was represented by Mr. Blunt. A39-42.[21] Instead, Respondent told the Tampa courts in his motions only generally that "unusual circumstances" existed in support of his second and third Tampa sealings, to wit: the arrests were "business related." A43.[22]

In an order entered May 30, 1991, the Ninth Judicial Circuit Court granted Petitioners' motion to intervene and granted the request to unseal the files. A8-13. The trial court recognized there were at least three different inquiries or "tests" in Florida potentially applicable to whether the files should remain sealed: the three-part constitutional inquiry established by this Court in *Press-Enterprise II* (and the similar "common law" test established by the Florida Supreme Court in *Miami Herald Publishing Co. v. Lewis*, 426 So. 2d 1 (Fla. 1982)); the "good cause" inquiry suggested in *Johnson v. State*, 336 So. 2d 93 (Fla. 1976)[23]; and the Second District's upside-down *Press-Enterprise* test created in the previous *Russell* case, 570 So. 2d at 983. Without deciding whether First Amendment rights were implicated, the court found that Petitioners had met the test "most onerous" to them, the Second District's *Russell* test, and found that the vacating of orders sealing the Ninth Circuit files served the public interest; that in absence of the vacating of these orders

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[21] Nevertheless, Petitioner State of Florida pointed out at the hearing, Florida's sealing and expunction statute was not intended to accord rights to repeated sealings or expunctions of records of repeated arrest. A44-46.

[22] No explanation appears anywhere how Respondent's cocaine arrest may have been "business related."

[23] In stating that section 901.33 could not require destruction of judicial records, the Florida Supreme Court said that sealing of court files was within the "discretion of the courts," and such files were subject to unsealing "upon good cause shown." *Johnson*, 336 So. 2d at 95.

there was a substantial probability that the public interest would be harmed; and that there was no less restrictive alternative that would adequately protect and serve the interests at stake. A12.[24]

The court provided that the files would remain sealed for thirty days to give Respondent time to appeal; on June 26, 1991, Respondent timely filed notice of his appeal to the Florida District Court of Appeal, Fifth District.

In an opinion issued February 7, 1992, the Fifth District Court of Appeal reversed. The court specifically noted Petitioners' contention that the federal Constitution required the court files in the cases to be unsealed, but stated:

> The question before us is whether properly sealed court records remain "public records" within the meaning of our statutes and constitution. We hold that they do not. They are former public records, now sealed, subject to being reopened as public records upon "good cause shown."

Russell v. Times Publishing Co., 592 So. 2d 808, 809 (Fla. Dist. Ct. App. 1992).[25] The court concluded that no "good

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[24] The trial court found:

> [I]t serves the public interest for the Court to vacate a sealing order obtained upon fraudulent evidence of entitlement to it. While it does not appear that Russell obtained the sealing orders at issue here upon "fraudulent evidence" it does appear that he did not fully disclose their existence to the Tampa courts when seeking sealing and expungement of the records of subsequent criminal charges in that jurisdiction and that this failure bears on the question of whether those Tampa records should now be unsealed. The courts considering whether to unseal Russell's subsequently incurred criminal charges must do so with all of the facts in hand.

A12. The court had specifically noted the inadequacy of Respondent's plea in Tampa that "unusual circumstances" existed: no facts had been detailed in support of this conclusory assertion. A42.

[25] What the court meant by "our statutes and constitution" is only explained by its footnote to the Florida Constitution and cases construing the sealing and expunction statute. Thus, the court rejected Petitioners' First Amendment arguments. It is unclear how the court found Respondent's court files to have been "properly sealed" since it

cause" had been pled or evidence offered, and remanded the case with directions to continue the files under seal.[26]

Thereafter, Petitioners Times and Herald, joined by the State of Florida, timely sought review in the Florida Supreme Court. Although it initially accepted jurisdiction of the case,[27] after a full briefing on the merits, the court dismissed the petition for review on March 11, 1993.[28] Petitioners State of Florida, Times, and Herald have timely invoked the jurisdiction of this Court.

C. How the Federal Question Was Raised.

Petitioners Times and Herald asserted the First Amendment as the basis for unsealing the court files in the trial court. A15, 18-22. The court did not directly decide whether the public and press had a First Amendment interest in the court files, but it found grounds for unsealing them. The Petitioners defended the trial court's decision on appeal by arguing a First Amendment interest in access to the files. The Fifth District Court of Appeal flatly rejected that such an interest existed because the files had been sealed. Petitioners asserted

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did not have the files before it. Indeed, it had denied Petitioners' motion to include them, sealed, in the appellate record. The court noted the Florida Supreme Court's decision in *Johnson v. State*, where that court stated its intention to adopt a court rule *requiring* the sealing of court files pertaining to first offenders "found innocent" and "those against whom criminal charges are dismissed." The Florida Supreme Court did adopt such a rule in 1977, Rule 3.692, Fla.R.Civ.P. The rule did not set forth any substantive standards, but codified a procedure to be followed to seek relief pursuant to section 901.33, and then, section 943.058.

[26] The court queried whether Florida's constitutional right of privacy "attach[ed] to those records once public but now sealed?" but noted that neither party had briefed or argued the issue. *Id.* at 809 n.2.

[27] *See Times Publishing Co. v. Russell*, 602 So. 2d 534 (Fla. 1992).

[28] *See Times Publishing Co. v. Russell*, 615 So. 2d 158 (Fla. 1983); A1-3. The Florida Supreme Court also refused to make the sealed files part of the record on appeal.

this interest again before the Florida Supreme Court, which dismissed the petition for review, finding no conflict between the Fifth District Court's decision and Florida cases holding a presumption of access attaches to ongoing proceedings in criminal and civil cases. A1, 2.

REASONS FOR GRANTING THE WRIT

This case presents the question whether, consistent with the First Amendment, a state court may maintain under seal judicial records of completed prosecutions without ever making, or having made, any "articulated findings" of an "overriding interest" to be served, findings repeatedly required by this Court since its decision in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980).

For nearly two decades, the Florida courts have sealed criminal court records based only on various versions of a Florida statute and procedural rule which provide for little inquiry beyond whether the defendant was convicted of an offense charged. As this case demonstrates, while the statute's purpose was to give first-time offenders a fresh start, and every version of the statute since 1980 expressly allowed the sealing of an arrest record only once in a person's lifetime, even that statutory requirement has not been followed. More importantly, based simply on the statute and procedural rule, for more than a decade, the Florida courts have sealed their criminal files without any regard for the abridgment of First Amendment access rights they were perpetrating. Now, the Florida Fifth District Court in this case has decided that the First Amendment is not implicated in any respect by the sealing of judicial records because of the state statute and procedural rule, and has perpetuated

the sealing of court files wholly in absence of any findings consistent with this Court's decisions addressing abridgement of access to criminal proceedings.[29]

Thus, as the Florida court interpreted Florida's "sealing and expunction" statute, it allows for the perpetual sealing of court records *without* specific findings that closure is essential to preserve a compelling governmental interest or "higher values," will be effective in preserving those values, and is narrowly tailored to do

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[29] The Florida Fifth District Court of Appeal is not alone in its view of the Florida courts' power to seal their criminal case files without attention to the First Amendment rights that are abridged. In *Donald G. Resha, Jr. v. Katie D. Tucker*, in which Resha petitions for a writ of certiorari in this Court simultaneously with the filing of the instant petition, the Florida First District Court of Appeal upheld a sealing order entered in October 1991 which contains no findings consistent with this Court's First Amendment standards. The First District Court rejected outright the notion that the First Amendment protects public access to the files of concluded criminal prosecutions (in *Resha*, the criminal prosecution of a Florida public official for criminal actions in the course of her official duties). *Resha v. Tucker*, 600 So. 2d 16 (Fla. Dist. Ct. App. 1992). *See also State v. Pena*, 593 So. 2d 282 (Fla. Dist. Ct. App. 1992), a decision of Florida's Fourth District Court of Appeal finding the sealing of criminal court files concerning a defendant *adjudicated guilty* of cocaine charges was "within the court's discretion" based solely on the language of section 943.058(2); and *Doe v. State*, 595 So. 2d 212 (Fla. Dist. Ct. App. 1992), another decision of the Fifth District Court of Appeal demonstrating adherence to its view that a criminal court file sealed in 1990 based solely on the statute, could not be reopened absent "good cause shown."

so.[30] Moreover, once court records have been sealed pursuant to the Florida statute and standardless rule of procedure, absent a constitutionally sufficient showing by the proponent of secrecy or constitutionally sufficient findings by the court, the proponents of access – the public, press and State of Florida – must bear the burden of adducing evidence why the files should be unsealed.[31]

Because the Federal Government and 45 States have enacted statutes similar to Florida's, with similar objectives in mind,[32] the circumstances presented here have

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[30] *Press-Enterprise II*, 478 U.S. at 13-14. As the Florida Fifth District Court of Appeal has interpreted the statute and Fla.R.Crim.P. 3.962, the statute "requires" perpetual sealing of those files relating to persons acquitted or against whom charges are dismissed. *See* 592 So. 2d at 809 n.3; A6-7 n.3. In *Press-Enterprise II*, a California statute similarly purported to allow the exclusion of the public and press from a preliminary hearing, based only on the defendant's request and a finding that closure was necessary to protect his fair trial right. *Id.*, 478 U.S. at 4 n.1. If that statute did not survive First Amendment scrutiny as applied, closure based merely on the Florida statute here certainly cannot.

[31] As this case demonstrates, this is true even where the former defendant concedes he or she withheld information from the courts in obtaining subsequent sealing orders. Moreover, it presents a conundrum: how is one to satisfy this challenge where the court files are sealed, non-judicial records are destroyed, and the court files are excluded from the record on appeal?

[32] *See, e.g.*, 18 U.S.C. § 3607; Ala. Code § 41-9-625 (1982); Alaska Stat. § 12.62.040 (1962); Ariz. Rev. Stat. Ann. § 13-4051 (1991); Ark. Stat. Ann. §§ 16-93-301 to -303 (1987); Cal. Penal Code §§ 851.7 to .85 (West 1982); Colo. Rev. Stat. § 24-72-308 (1988); Conn. Gen. Stat. § 54-142a (1987); Del. Code Ann. tit. 11, §§ 4371-4375 (1974); Ga. Code Ann. §§ 35-3-37, 17-8-6 (1987 & Supp. 1990); Hawaii Rev. Stat. § 831-3.2 (1985 & Supp. 1989); Idaho Code § 19-4813 (1987); Ill. Ann. Stat. ch. 38, § 206-5 (Smith Hurd Supp. 1991); Ind. Code Ann. §§ 35-38-5-1 to -6 (Burns 1985 & Supp. 1990); Iowa Code Ann. §§ 692.5 to .17 (1987 & Supp. 1991); Kan. Stat. Ann. § 21-4619 (Supp. 1990); Ky. Rev. Stat. § 510.300 (1990); La. Rev. Stat. Ann. §§ 15:593, 40:983, 44:9 (West 1982 & Supp. 1991); Me. Rev. Stat. Ann. tit. 16, § 620 (1964); Md. Crim. Law Code Ann. §§ 735 to 741 (1987 & Supp. 1990); Mass. Gen. Laws Ann. ch. 276 §§ 100A to C (Supp. 1991); Mich. Comp. Laws Ann. § 28.243 (West Supp. 1991); Minn. Stat. § 299C.11 (1990); Miss. Code Ann. §§ 21-23-7, 41-29-150, 45-31-5,

and are likely to recur across the Nation, imperiling, on a nationwide scale, significant First Amendment interests worthy of this Court's protective intervention.[33] Florida's statute, as applied by the Florida Court in this case, is repugnant to the First Amendment.

I. The Florida Court Has Decided The Federal Questions Presented In A Way That Conflicts With The Rationale Of This Court's First Amendment Access Decisions And In A Way That Directly Conflicts With Decisions Of The United States Circuit Courts Of Appeals.

A. This Court's Decisions And Those Of The United States Circuit Courts Of Appeals Accord First Amendment Protection To More Than Just On-Going Trials.

In *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), seven Justices of this Court found implicit in the

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99-15-26, 99-19-71 (1972 & Supp. 1990); Mo. Rev. Stat. §§ 610-100 to .120 (1986 & Supp. 1991); Mont. Code Ann. § 44-5-202, 44-5-301 to -305 (1979); Neb. Rev. Stat. § 29-3523 (1989); Nev. Rev. Stat. §§ 179.245 to .301 (1980 & Supp. 1989); N.H. Rev. Stat. Ann. §§ 593.4, 651.5 (1986 & Supp. 1990); N.J. Stat. Ann. § 2C:52-1 to :52-32 (1982); N.M. Stat. Ann. §§ 28-2-3, 29-10-1 to -8 (1978); N.Y. Crim. Proc. Law §§ 160.50 to .60 (McKinney 1984 & Supp. 1991); N.C. Gen. Stat. § 90-96 (1990); Ohio Rev. Code Ann. §§ 2953.31 to .61 (Page 1987 & Supp. 1990); Okla. Stat. tit. 22, §§ 18-19 (Supp. 1990); Or. Rev. Stat. § 137.225 (1989); 18 Pa. Cons. Stat. Ann. § 9122 (Purdon 1989); R.I. Gen. Laws §§ 12-1-12, 12-1-12.1, 12-1.3-1 to .3-4 (Supp. 1990); S.C. Code Ann. § 17-1-40 (Law. Co-op. 1976); S.D. Codified Laws Ann. §§ 23A-27-13 to -17 (1988); Tenn. Code Ann. §§ 40-15-105, 40-32-101 to -104 (1990); Tex. Crim. Proc. Code Ann. §§ 55.01 to .05 (Vernon Supp. 1991); Utah Code Ann. § 77-18-2 (Supp. 1991); Va. Code §§ 19.2-392.1 to -392.4 (1990); Wash. Rev. Code § 10.97.060 (1989); W.Va. Code § 15-2-24 (1991); Wis. Stat. Ann. § 973.015 (West 1985); Wyo. Stat. § 7-19-109 (1977). This list does not include those statutes applicable only to juveniles.

[33] "Because the Federal Government and most of the States have enacted statutes with similar objectives, the issue is significant and likely to recur. We accordingly granted certiorari[.]" *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, 112 S. Ct. 501, 508 (1991) (invalidating Son of Sam statute on First Amendment grounds).

First Amendment a right of public access to criminal trials applicable to the States through the Fourteenth Amendment. Two years later, the Court reaffirmed its view in a majority opinion in *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982), and held repugnant to the First Amendment a state trial court order excluding the public and press from a criminal trial based on a statute purporting to close all trials involving minor victims of sex offenses. "[A] mandatory [closure] rule, requiring no particularized determinations in individual cases, is unconstitutional." *Globe*, 457 U.S. at 611, n. 27. The "particularized determinations" this Court deemed "essential" were (1) that "a compelling, governmental interest" necessitating closure existed *in the particular case* at issue and (2) that any closure imposed was "narrowly tailored to serve that interest." *Id.*, 457 U.S. at 606-07.[34] Subsequently, in opinions underscoring the societal values inherent in public access to criminal proceedings, this Court extended the First Amendment's protection of public access rights to proceedings and transcripts other than trials themselves, specifically to voir dire in criminal cases, *Press-Enterprise v. Superior Court*, 464 U.S. 502 (1984) ("*Press-Enterprise I*"), and to preliminary (or "probable cause") hearings in criminal cases, *Press-Enterprise II*, 478 U.S. 1.[35]

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[34] In particular, this Court said that while the protection of juvenile sex crime victims was a "compelling governmental interest," the trial courts must consider factors relating to the particular individuals the closure was designed to protect in each case. *Id.*, at 608-09. No consideration has ever been given to the individual any one of the six closures at issue in this case was "designed to protect" or even to what "compelling interest," governmental or otherwise, was being served. Indeed, the trial court, the only court with the files in hand, found it served the public interest to unseal them. A12.

[35] *See also Waller v. Georgia*, 467 U.S. 39, 46 (1984) (defendant's Sixth Amendment rights prevented total closure of suppression hearing, but in most circumstances qualified First Amendment right of access would also attach).

Notably, in *Press-Enterprise I*, a California court had closed all but three days of a six-week voir dire in a highly publicized criminal case and had refused to release the transcripts even when the trial concluded. Reversing, this Court stated, in an observation directly applicable here:

> The value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that anyone is free to attend gives assurance that established procedures are being followed and that deviations will become known. Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.

464 U.S. at 508. Again, this Court stressed the necessity of individualized determinations when closure is considered. Moreover, this Court has rejected the notion that the First Amendment applies only to trials or to trial-like proceedings. Stressing the "significant positive role" access plays in the public perception, the Court noted, "the preliminary hearing in many cases provides the sole occasion for public observation of the criminal justice system." *Press-Enterprise II*, 478 U.S. at 12.[36] With regard to the sealed files concerning Respondent, there is now *no* occasion for public observation, and no indication how

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[36] The Court echoed the opinion of Justice Blackmun, joined by Justices Brennan, White and Marshall, in *Gannett Co. v. DePasquale*, 443 U.S. 368, 435 (1979) (Blackmun, J., concurring in part, dissenting in part):

> The searches and interrogations that [suppression] hearings evaluate do not take place in public. The hearing therefore usually presents the only opportunity the public has to learn about police and prosecutorial conduct, and about allegations that those responsible to the public for the enforcement of laws themselves are breaking it.

the criminal justice system functioned, other than to accord him sealing of the files.[37]

Drawing heavily on this Court's explications of the lessons of history and the prophylactic value of public access to judicial proceedings, a majority of the United States Courts of Appeals have held that the First Amendment protects the public's right of access to other pre-trial and post-trial court proceedings and documents filed in connection with them, including the motions, plea agreements, and other materials filed in connection with proceedings other than the actual criminal trial itself. The cases are legion. Relying on *Richmond Newspapers*, *Globe Newspaper*, and the *Press-Enterprise* cases, the Circuit Courts have held the qualified First Amendment right of public access attaches to almost every stage of a criminal proceeding, except grand and petit jury deliberations.[38]

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[37] Fla. Stat. § 901.33 (1979) purported to require total closure of even "trials" and the original charging documents. Petitioners are unable to say what exactly was sealed below. The Fifth District and Florida Supreme Courts refused to look.

[38] As to "post-trial" proceedings, or those, such as pleas, which take the place of trial, *see Washington Post v. Robinson*, 935 F.2d 282 (D.C. Cir. 1991) (First Amendment right of access to plea agreement and related documents); *Oregonian Publishing Co. v. United States District Court*, 920 F.2d 1462 (9th Cir. 1990) (First Amendment right of access to plea agreement); *In re Washington Post Co.*, 807 F.2d 383 (4th Cir. 1986) (First Amendment right of access to plea and sentencing); *CBS, Inc. v. United States District Court*, 765 F.2d 823 (9th Cir. 1985) (First Amendment right of access to post-trial proceedings, including motion for reduction of sentence). As to pre-trial proceedings, such as bond reduction hearings, other motions and court dockets, *see United States v. Valenti*, 987 F.2d 708 (11th Cir. 1993) (First Amendment right of access to court's docket and pre-trial proceedings); *In re New York Times Co.*, 828 F.2d 110 (2d Cir. 1987) (First Amendment right of access to motions submitted in connection with pretrial proceedings); *United States v. Smith*, 776 F.2d 1104 (3d Cir. 1985) (First Amendment right of access to indictments, informations and bills of particulars); *United States v. Peters*, 754 F.2d 753 (7th Cir. 1985) (First Amendment right of access to voir dire and trial exhibits); *In re Globe Newspaper Co.*, 729 F.2d 47 (1st Cir. 1984) (First Amendment right of access to pretrial proceedings and documents); *Associated Press v. United States*, 705 F.2d 1143 (9th Cir. 1983)

Thus, the Circuit Courts have held that like court hearings and trials, court records in criminal cases cannot be sealed without providing the press and public notice and an opportunity to be heard in opposition to closure, and cannot be sealed absent factually specific findings detailing the compelling governmental interest or "higher values" that will be served by closure, that closure will be effective in protecting the compelling interest, and that there are available no less restrictive alternatives to total closure. *See Press-Enterprise II*, 478 U.S. at 14.

Furthermore, unlike the Florida Court, this Court and the federal appellate courts have specifically rejected the notion that a statute or procedural rule mandating secrecy, standing alone, without specific factual findings based on evidence presented by the proponent of secrecy meeting the *Press-Enterprise II* standard, can support closure of court proceedings or records. *Globe Newspaper*, 457 U.S. at 608-09; *In re Washington Post Co.*, 807 F.2d at 393; *Globe Newspaper Co. v. Pokaski*, 868 F.2d 497 (1st Cir. 1989).[39]

(First Amendment right of access to pretrial documents, including motions); *United States v. Chagra*, 701 F.2d 354 (5th Cir. 1983) (First Amendment right of access to pretrial bail reduction hearing); *United States v. Brooklier*, 685 F.2d 1162 (9th Cir. 1982) (First Amendment right of access to voir dire and suppression hearing; in addition, denial of motion for release of transcripts of closed proceedings must itself satisfy First Amendment's requirements); *United States v. Criden*, 675 F.2d 550 (3d Cir. 1982) (First Amendment right to attend suppression hearing).

[39] The district court in *Washington Post* relied in a conclusory fashion on the federal Classified Information Procedures Act (CIPA) to close a plea hearing and related documents filed with the court. Reversing, the Fourth Circuit held that the existence of CIPA did not excuse the district court from engaging in the three-part constitutional analysis required by this Court in *Press Enterprise II* and making specific factual findings in support of its closure order.

> A blind acceptance by the courts of the government's insistence on the need for secrecy, without notice to others, without argument, and without a statement of reasons,

B. The United States Court Of Appeals For The First Circuit Has Held That A Statute Mirroring Florida's Places Impermissible Burdens On The First Amendment.

The decision of the Florida Court directly conflicts with a decision of the United States Court of Appeals for the First Circuit invalidating on First Amendment grounds a state statute similar to Florida's in its provision for sealing of completed criminal prosecutions without *Press-Enterprise II* findings. In *Globe Newspaper Co. v. Pokaski*, 868 F.2d 497 (1st Cir. 1989), a newspaper challenged on First Amendment grounds a Massachusetts statute providing for (1) the automatic sealing of court records in criminal cases where the defendant was found not guilty or there was a finding of no probable cause, and (2) upon the court finding that "substantial justice would be best served," the sealing of criminal court records where charges were resolved by *nolle prosequi* or dismissal.[40] Like the Petitioners here, the petitioners in *Pokaski* sought access to certain of those court files which had been sealed for some time pursuant to this statutory scheme.

The First Circuit ruled that neither provision of the statute, and thus no sealings of court files in conformity with the statute, survived First Amendment scrutiny because, in light of the *Press-Enterprise* cases and *Globe Newspaper*, the sealing of court records cannot be justified on the basis of generalities. To the contrary, abridgement of First Amendment access rights must be analyzed on a case-by-case basis: *each* defendant seeking sealing of his

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would impermissibly compromise the independence of the judiciary and open the door to possible abuse.

In re Washington Post Co., 807 F.2d at 392. The same is undoubtedly true of "blind acceptance" of a former defendant's need or desire for secrecy.

[40] Similar to the Florida statute at issue here, the Massachusetts statute also provided for the withdrawal from public view of the records of probation officers.

or her records must make a specific showing of the compelling interests justifying sealing, and even then, the sealing of court records cannot be broader than necessary to protect the compelling interest advanced by the defendant.[41] Moreover, as to those records which were sealed pursuant to the second part of the statute – requiring a showing that sealing best served "substantial justice" – the court specifically held that that standard did not automatically equate with the showing required by this Court, but that where specific findings comporting with this Court's requirements *had been* made, the records could remain sealed consistent with the Constitution.

Notably in the present case, Respondent has *never* asserted that he made the constitutionally required showing. Had he, there would be no conflict with the First Circuit's decision. However, at every stage of the proceedings concerning his six sealed court files, Respondent has relied *only* on Florida's sealing and expunction statute as the basis for his sealings. To this extent, the Florida First District Court framed its issue on an erroneous assumption: i.e., that Respondent's records were "properly sealed." As the First Circuit held in *Pokaski*, the records could not have been "properly sealed" if the First Amendment standards were not met, even given the existence of a statute purporting to direct or allow for their sealing. Respondent here has never even tried to meet the constitutional standards, nor has he ever asserted that he met them in the first instance.

In their interpretation of Florida's statute, the courts below have adopted a "speak now or forever hold your peace" approach to the sealing of court records. In other words, if public proceedings take place in a criminal case and no member of the public or press is present to object

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[41] Even assuming Respondent could have demonstrated a compelling interest justifying closure of his six criminal files, wholesale sealing would be overbroad under this analysis, as is the Florida Fifth District's apparent view of the Florida statute or rule of procedure as *requiring* sealing in the first instance.

to sealing when the defendant requests it, then the records are presumed "properly sealed," and the public and press will forever after bear the burden of adducing evidence to show why the court files should be unsealed even if they were sealed without regard to the *Press-Enterprise* standards. In this respect, the Florida court's decision also directly and explicitly conflicts with the First Circuit's in *Pokaski*.

The Florida decision narrowly – and improperly – confines First Amendment rights to a single "window in time." As the *Pokaski* court pointed out, simply because the records were *once* open does not mean the interests protected by the First Amendment are fully served.[42] The interests described by this Court in *Richmond Newspapers* – in sum, the contribution of openness to public assurance of the integrity of the court system – continue even after a criminal proceeding has concluded:

> These interests seem clearly implicated in this age of investigative reporting and of continuing public concern over the integrity of government and its officials. Amicus cannot see any salubrious effect on a criminal proceeding produced by subsequent access to the records of that proceeding. But the present prospect of future access is a felt presence, just as the prospect of appellate review is for the lawyers and judge in the trial of a case.

868 F.2d at 503-04.[43] Moreover, "access to completed proceedings is indispensable where what is at issue is the system itself." *Id.* at 503 n. 12. "The system itself" is

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[42] Moreover, if this were true, the burden to justify why judicial proceedings and records should be open would almost always fall on the party seeking access. Disputes over access rarely arise until access is forbidden.

[43] In rejecting the argument that once public proceedings take place in a criminal case the records of that case may be sealed without offending the First Amendment, the First Circuit observed that this concept was a "strict, harsh one, narrowly confining First Amendment

clearly at the heart of this case, where, concededly without making any specific showing meeting the *Press-Enterprise* test, and even without making full disclosure to the courts sealing judicial records of three subsequent arrests, Respondent, a private investigator and operator of a boiler-room charity, has been able to seal all judicial records of at least *six* arrests.

Further compounding the erroneous view that First Amendment access rights were not at stake here, the Florida court's decision validates the sealing of court records pursuant to the Florida statute, even where the sealings are unsupported by findings comporting with *Press-Enterprise*, and then places the burden of vindicating First Amendment rights on the public that seeks to exercise them. In this respect also, the *Pokaski* court found Massachusetts' statute constitutionally invalid. To the extent the statute permitted the sealing of records without satisfaction of First Amendment standards, and then placed the burden on the press and public to challenge the sealing, it "impermissibly burden[ed] the First Amendment." *Id.* at 507.

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interests in what might be a large problem of governance to a temporally immediate, discrete episode." *Pokaski*, 868 F.2d at 504. Moreover,

> It seems to us to contradict the insight, expressed in *Richmond Newspapers*, 448 U.S. at 572-73, 100 S.Ct. at 2825: "Instead of acquiring information about trials by firsthand observation or by word of mouth from those who attended, people now acquire it chiefly through the print and electronic media. In a sense, this validates the media claim of functioning as surrogates for the public." If the press is to fulfill its function of surrogate, it surely cannot be restricted to report on only those judicial proceedings that it has sufficient personnel to cover contemporaneously.

Id.

II. The Florida Court Has Decided Important Questions Of Federal Law Which Should Be Settled By This Court.

As this Court has noted time and again, the historical tradition in this nation is one of presumptive openness of the proceedings occurring in our criminal courts. *See Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597 (1978).[44] The societal values on which this Court has heavily relied in construing the First Amendment inhere in court records just as they inhere in preliminary hearings, suppression hearings and trials. Indeed, the values served by open records and proceedings must surely be heightened in those cases where no public trial or preliminary hearing ever took place or will ever occur – instances where the judiciary's records were, are and will be the public's *only* opportunity to observe the responses of police, prosecutors, defense lawyers, and the courts to allegations and official charges of criminal activity.[45]

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[44] It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents. In contrast to the English practice, [] American decisions generally do not condition enforcement of this right on a proprietary interest in the document or upon a need for it as evidence in a lawsuit. The interest necessary to support the issuance of a right compelling access has been found, for example, in the citizen's desire to keep a watchful eye on the workings of public agencies, [] and in a newspaper publisher's intention to publish information concerning the operation of government.

Nixon, 435 U.S. at 597-98 (citations omitted).

[45] *See Press-Enterprise II*, 478 U.S. at 12 (observing that because California's preliminary hearing "in many cases provides 'the sole occasion for public observation of the criminal justice system'" societal values are served by extending First Amendment access protections to it); *Gannett Co.*, 443 U.S. at 434-435 (Blackmun, J., concurring in part and dissenting in part) (noting that overwhelming majority of prosecutions end in dismissals or pleas).

> People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing.

Press-Enterprise I, 464 U.S. at 509 (quoting *Richmond Newspapers*, 448 U.S. at 572). How Respondent was able to obtain relief the federal courts generally consider extraordinary[46] on six different occasions is but one of the things the people are prohibited from observing here.

In declining to review the decision of the Florida Fifth District Court of Appeal in this case and in *Resha v. Tucker*,[47] the Florida Supreme Court has confined Florida's common law protecting public access to criminal proceedings and court records to only those cases on-going at the time the access question is raised.[48] This extreme incursion on public access rights should be addressed, at last, and settled by this Court. The "age" of a court file should not be the determinative factor for whether First Amendment rights of access attach to it, because there is no reasoned distinction between the values underlying access to on-going proceedings and those adhering to proceedings which have concluded, especially in the criminal context.[49] If the length of time a

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[46] *See, e.g., United States v. G.*, 774 F.2d 1392 (9th Cir. 1985) (reversing order expunging criminal record because of lack of legal basis for relief and lack of evidence of defendant's personal reasons for desiring expunction); *United States v. Linn*, 513 F.2d 925 (10th Cir. 1975) (acquittal, standing alone, insufficient to warrant expunging defendant's criminal record).

[47] Docketed for review by this Court in a contemporaneously filed Petition for Writ of Certiorari.

[48] In other words, Florida's common law would eschew any protection for public access rights beyond the conclusion of a proceeding, at least where the records of the proceeding were sealed in reliance on some version of Fla. Stat. § 943.058.

[49] To the extent [a right of access] exists, it exists today for the records of cases decided a hundred years ago as surely as it does for lawsuits now in the early stages of motions

sealing or exclusion order sat in place before it was discovered and challenged could cut off all First Amendment rights, this Court's decisions providing for public notice and an opportunity to be heard in opposition to such an order would surely be eviscerated by litigants who wish to avoid the challenge or by courts which do not discern any significant rights at stake.[50]

Official court files are repositories of the history of governmental action. Citizens depend not only upon "breaking news" to make informed decisions about their government, its leadership, and other persons in whom public trust is reposed, but also upon information obtained and viewed from the historical perspective.[51]

> litigation. The fact that a suit has gone to judgment does not in any sense militate against the public's right to prosecute a substantiated right to see the records of a particular case. Moreover, access to court records does not involve relitigation of the underlying dispute, so the rationale behind requiring extraordinary circumstances for post-judgment intervention does not as a rule apply to access claims.

Mokhiber v. Davis, 537 A.2d 1100, 1105-06 (D.C. 1988) (concerning motion for access to court files of civil case four years after settlement and stipulated sealing). *See also Bank of America Nat. Trust & Sav. Ass'n. v. Hotel Rittenhouse Ass'n.*, 800 F.2d 339 (3d Cir. 1986) (access to settlement documents in civil suit); *Wilson v. American Motors Corp.*, 759 F.2d 1568 (11th Cir. 1985) (access to court files of concluded civil litigation).

[50] Significantly, there is no provision of Florida law which places a time limit on when a former defendant can move for sealing of his court file or arrest records.

[51] Petitioner the State of Florida's interest in this matter extends beyond its desire to see state statutes applied consistent with the federal Constitution. The State's interest here is underscored by the effect of Florida courts' "expunction" orders. When a court directs "expunction" of non-judicial records of state law enforcement agencies, it means that such records are, quite literally, *destroyed*, leaving the sealed court file as the only memorialization of government action or inaction in any particular case. If court records, the only surviving repository of history, are to be withdrawn from public view, that must occur only to serve a compelling interest specifically demonstrated by the proponent of closure, and only to the least restrictive extent necessary to serve that

The termination of a judicial proceeding degrades neither the lessons to be learned from it nor the information to be gleaned from it but often enhances both. Indeed, as a practical matter, criminal proceedings appearing "routine" from a present perspective, or those where few if any hearings take place, may be most deserving of scrutiny, which can occur only if the records are available to the public for inspection. "Public confidence cannot long be maintained where important judicial decisions are made behind closed doors and then announced in conclusory terms to the public, with the record supporting the court's decision sealed from public view." *United States v. Cianfrani*, 573 F.2d 835, 851 (3rd Cir. 1978).

Three Members of this Court recently stated, in an observation no less applicable to the trial or appellate courts of any State:

> The root of American governmental power is revealed most clearly in the instance of the power conferred by the Constitution upon the Judiciary of the United States and specifically upon this Court. As Americans of each succeeding generation are rightly told, the Court cannot buy support for its decisions by spending money and, except to a minor degree, it cannot independently coerce obedience to its decrees. The Court's power lies, rather, in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands.

Planned Parenthood of Southeastern Pennsylvania v. Casey, 112 S. Ct. 2791, 2814 (1992). This Court has frequently observed that public confidence and trust in the criminal justice system are essential components of the operation of that system. Public confidence and trust are undermined

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interest. As this case vividly demonstrates, the Florida courts do not recognize the significance of their actions in this respect.

by secrecy.[52] The accuracy of this Court's observations that it is not just fairness and propriety that matter, but the appearance of fairness and propriety, is nowhere more clearly demonstrated than in the case of Florida's sealing and expunction statute. Because such statutes, as they are permitted to serve as sole grounds for a judicial rubber stamp of secrecy, have the demonstrated potential and effect of undermining the people's confidence in their government institutions, most especially the judiciary, this case merits this Court's full consideration and reversal.

Respectfully submitted,

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[52] *See, e.g., New York Times Co. v. United States*, 403 U.S. 713, 724 (1971) (Douglas, J., concurring) ("Secrecy in government is fundamentally anti-democratic, perpetuating bureaucratic errors").

SUPREME COURT OF FLORIDA

No. 79,496

TIMES PUBLISHING COMPANY, MIAMI HERALD PUBLISHING COMPANY, and THE STATE OF FLORIDA, Petitioners,

v.

JOHN LEWIS RUSSELL, III, Respondent.

[March 11, 1993]

McDONALD, J.

We accepted review of *Russell v. Times Publishing Co.*, 592 So. 2d 808 (Fla. 5th DCA 1992) (*Russell II*), based on the Times argument that the district court's opinion conflicted with *Miami Herald Publishing Co. v. Lewis*, 426 So. 2d 1 (Fla. 1982), *Barron v. Florida Freedom Newspapers, Inc.*, 531 So. 2d 113 (Fla. 1988), and *Russell v. Miami Herald Publishing Co.*, 570 So. 2d 979 (Fla. 2d DCA 1990) (*Russell I*). Pursuant to article V, section 3(b)(3) of the Florida Constitution, this Court has subject-matter jurisdiction over any decision of a district court of appeal that "expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law." Because *Russell II* does not present the necessary express and direct conflict, this Court lacks jurisdiction to decide the case.

In *Lewis*, we established a three-prong test for determining whether criminal pretrial proceedings should be

closed to the general public. The *Lewis* test requires that the party seeking closure prove the following:

> 1. Closure is necessary to prevent a serious and imminent threat to the administration of justice;
>
> 2. No alternatives are available, other than change of venue, which would protect a defendant's right to a fair trial; and,
>
> 3. Closure would be effective in protecting the rights of the accused, without being broader than necessary to accomplish this purpose.

Lewis, 426 So. 2d at 6. The *Lewis* test was designed to "address the problems of prejudicial pretrial publicity and the competing constitutional rights to a fair trial by an impartial jury for criminal defendants." *Barron*, 531 So. 2d at 118. In *Barron*, where the issue involved closure of a civil divorce proceeding, we placed the burden of justifying closure on the party seeking closure. *Id.*

In both *Lewis* and *Barron*, Florida's strong public policy in favor of open government warranted the placement of the burden on the party seeking closure. In the instant case, the district court held that properly sealed court records cannot be unsealed unless the party seeking to unseal the records shows "good cause." *Russell II*, 592 So. 2d at 809. Seeking to close records that are presumably open is a substantially different task than seeking to open records that have already been closed by a court. Therefore, we find that the district court's placement of the burden and its "good cause" standard in the instant case does not conflict with the burden and tests articulated in *Lewis* and *Barron*. Furthermore, the district court's opinion in the instant case does not conflict with the Second

District Court of Appeals' decision in *Russell I*.* In *Russell I*, as in the instant case, the court placed the burden of proof on the party seeking to reopen sealed records.

Because we do not find any conflict to support this Court's jurisdiction, the petition for review is dismissed.

It is so ordered.

BARKETT, C.J., and OVERTON, SHAW, GRIMES, KOGAN and HARDING, JJ., concur.

NO MOTION FOR REHEARING WILL BE ALLOWED.

Application for Review of the Decision of the District Court of Appeal – Direct Conflict of Decisions

Fifth District – Case No. 91-1469

(Orange County)

Lawson L. Lamar, State Attorney and William C. Vose, Chief Assistant State Attorney, Orlando, Florida; and George K. Rahdert and Alison M. Steele, of Rahdert & Anderson, St. Petersburg,

for Petitioners

Richard S. Blunt, Tampa, Florida,

for Respondent

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* Nor is *Russell II* in conflict with cases decided subsequent to that decision.

IN THE DISTRICT COURT OF APPEAL OF THE
STATE OF FLORIDA
FIFTH DISTRICT JANUARY TERM 1992

JOHN LEWIS RUSSELL, III,

Appellant,

CASE NO.
91-1469

v.

TIMES PUBLISHING COMPANY,
MIAMI HERALD PUBLISHING
COMPANY, and STATE OF
FLORIDA,

Appellees.

_____/

Opinion filed February 7, 1992

Appeal from the Circuit Court
for Orange County,
George A. Sprinkle, IV, Judge.

Richard S. Blunt, Tampa, for Appellant.

George K. Rahdert, Thomas H. McGowan,
Alison M. Steele, of Rahdert & Anderson,
St. Petersburg, for Appellees Times Publishing
Company and Miami Herald Publishing Company.

Lawson L. Lamar, State Attorney, and
William C. Vose, Chief Assistant State
Attorney, Orlando, for Appellee State of Florida.

HARRIS, J.

In the spring of 1991, the Times Publishing Company (the St. Petersburg Times) and the Miami Herald Publishing Company discovered that John Lewis Russell, III (the founder and chief executive officer of the Bureau of Missing Children, Inc. – a charitable fund raising organization) had obtained three orders sealing court files relating to arrests in Orange County.[1]

The Times and the Herald moved to "intervene" in the closed, sealed cases of *State v. Russell,* numbers 77-1096, 75-3275 and one other unknown number and to unseal these records because:

> Well established principles of federal and state constitutional and common law require that these court records be opened for public inspection.

The trial court, without taking any testimony and without receiving any documentary evidence, granted the motion to intervene and unsealed the court files. We reverse.

Most of the authority cited by petitioner [sic] relates to open court proceedings. We agree that the public should have full access to trials and other public proceedings. The rights of the press are coextensive with the rights of the public.

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[1] This information was discovered during litigation to unseal certain records of Russell in Hillsborough County, a matter presently pending before the Second District Court of Appeal.

The question before us is whether properly sealed court records remain "public records" within the meaning of our statutes and constitution.[2] We hold that they do not. They are former public records, now sealed, subject to being reopened as public records upon "good cause shown."[3]

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[2] Neither party in their brief nor in their oral presentation discussed the Florida constitutional right to privacy. Although the right yields to public records disclosure, does it attach to those records once public but now sealed?

[3] Although the court's authority to seal its own records is not based on statute, it is nevertheless analogous to the statutory power given to "seal or expunge" arrest records. As the supreme court held in *Johnson v. State*, 336 So.2d 93 (Fla. 1976):

> Therefore, to achieve the legislative purpose in this case we hold that to the extent that Chapter 74-206, Laws of Florida 1974, grants a substantive right to a defendant, the statute is valid; and we find that the law is substantive to the degree that it protects appellant from having his record left open for public inspection in the Criminal Division of the Circuit Court. To achieve the legislative intent under the unique circumstances of the instant case without violating the Constitution, we direct the learned trial judge to seal Appellant's record and to retain it sealed subject to the power of the court *for good cause shown* to open it under conditions wherein the ends of justice may require it.
>
> * * *
>
> Nevertheless, insofar as chapter 74-206, Laws of Florida 1974, attempts to establish procedure for the accomplishment of the new, substantive right, we find and so hold that it is an encroachment upon the judicial function and, therefore, unconstitutional to that degree. Consequently, the Court will consider

We can envision some "good cause" reasons for unsealing records; for example, if judicial conduct is questioned. In that event the court file, with the individual defendant's name redacted, could be made available. Also, if it is shown that the defendant perjured himself in order to obtain the sealing, the file should be reopened.

In the instant case, there was no "good cause" pled and no evidence offered. The cause is remanded with directions to continue the files under seal.

REVERSED and REMANDED.

COWART and DIAMANTIS, J.J., concur.

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adoption of a rule to effectuate the legislative intent by *requiring the sealing of court records of first offenders found innocent or those persons against whom criminal proceedings are dismissed.* [Emphasis added.]

IN THE CIRCUIT COURT IN AND FOR
THE NINTH JUDICIAL CIRCUIT
STATE OF FLORIDA

STATE OF FLORIDA

v.

JOHN LEWIS RUSSELL, III.

_____/.

Case No.
CR-77-1096
CR-75-3275

ORDER

THIS CAUSE came on to be heard on the Motion to Intervene, for Order Consolidating Cases and for Order Unsealing Court Records filed by the Times Publishing Company and the Miami Herald Publishing Company ("the Times" and "the Herald" or "the Movants"). Present at the hearing were counsel for the Times and Herald, counsel for the State, and counsel for John Lewis Russell, III.

The Times and Herald seek to intervene in three completed criminal cases in this circuit in which John Lewis Russell, III ("Russell") was the defendant. The court files relating to these cases were sealed several years ago upon Russell's request. Russell is the founder of Bureau of Missing Children, Inc., ostensibly a charity which solicits charitable contributions from the public by telephone.

Upon receipt of the Times and Herald's motion, the Clerk of Court located two sealed court files relating to criminal charges against Russell. Case No. CR-77-1096 concerns a 1977 grand larceny charge; Case No.

CR-75-3275 concerns a 1975 worthless check charge. Both of these cases were sealed pursuant to a court order dated February 4, 1980. An additional 1975 criminal case to which the Movants seek access, concerning charges of carrying a concealed weapon and disorderly conduct, was not located in advance of the hearing and the Court is not aware of its case number.

In addition to the aforesaid sealed cases, there are three sealed cases involving criminal charges against Russell in the Thirteenth Judicial Circuit. In 1979, Mr. Russell was charged with carrying a concealed firearm; he pled nolo contendere to a misdemeanor, carrying a concealed weapon, and adjudication was withheld. The felony and misdemeanor case files were sealed pursuant to Russell's request in 1980. The records relating to Russell's 1981 grand theft arrest in Tampa were sealed in 1982, after the charge was dismissed pursuant to Russell's motion. In 1984 Russell was arrested in Tampa for possession of cocaine and paraphernalia; he received a Letter of Release from the State Attorney with reference to these charges and obtained an order sealing the records the same year. Since 1989 the Herald, subsequently joined by the Times, has been seeking to have the Tampa records unsealed. The existence of the three sealed files in this jurisdiction came to the Movants' attention in April of this year. The existence of these Ninth Judicial Circuit files had not previously been disclosed by Russell or his attorney.

The threshold issue in this cause is whether this Court has jurisdiction to rule on the Times' and Herald's motions. At the start of the hearing, Richard S. Blunt, Esquire filed and served in his own name as the moving

party a Motion to Question the Jurisdiction of the Court and Motion to Quash Movants['] Motion to Intervene. Without question, the Court has jurisdiction to determine whether its own files should be sealed or unsealed. Moreover, Mr. Blunt, who by his own admissions represents Russell in proceedings in the Second District Court of Appeal and the Thirteenth Judicial Circuit in which the Herald and Times challenge the sealing and expunction of criminal charges in that jurisdiction, appeared at the hearing on the motion to intervene, filed a motion, and subsequently argued in the interests of Russell in these cases. The Court therefore finds that Mr. Blunt's motion is not well-taken.

With regard to the motion of the Times and the Herald, the Court finds that these Movants, members of the press, have standing to intervene and seek unsealing of court files. *Miami Herald Publishing Co. v. Lewis*, 426 So.2d 1 (Fla. 1982); *State ex rel. Miami Herald Publishing Co. v. McIntosh*, 340 So.2d 904 (Fla. 1977).

The Times and Herald argued that the public has a First Amendment and common law right of access to judicial records and proceedings, and that for court records to be sealed the proponent of sealing must satisfy the three-part test set forth in *Press Enterprise Co. v. Superior Court*, ___ U.S. __, 106 S.Ct. 2735 (1986) (*Press Enterprise II*), *Press Enterprise Co. v. Superior Court*, 467 U.S. 501 (1984) (*Press Enterprise I*), *Bundy v. State*, 455 So.2d 330 (Fla. 1984), and *Miami Herald Publishing Co. v. Lewis*, 426 So.2d 1 (Fla. 1982). Under these tests and the reasoning of the courts in *Barron v. Florida Freedom Newspapers, Inc.*, 531 S[o].2d 113 (Fla. 1988), and *Goldberg v. Johnson*, 485 So.2d 1386 (Fla. 4th DCA 1986), the burden of satisfying the

Press Enterprise/Miami Herald v. Lewis tests rests on the proponent of sealing.

The Court recognizes, however, as the Times and Herald pointed out in their motion and as Russell urged at the hearing, that the Second District Court of Appeal in a case addressing the unsealing of court records also involving Russell, set forth a different three-part test applicable to requests to unseal court files: (1) vacation of the sealing order would serve the public interest; (2) there is a "substantial probability" that, in absence of vacation of the closure order, the public would be harmed; and (3) no less restrictive alternatives are available. *Russell v. Miami Herald Publishing Co.*, 570 So.2d 979 (Fla. 2d DCA 1990). In that case, the Court placed the burden of meeting the test on the Herald, the proponent of unsealing.

The Florida Supreme Court has suggested yet a third potential test applicable to this case. In *Johnson v. State*, 336 So.2d 93 (Fla. 1976), the Court indicated that files ordered "expunged" pursuant to a former criminal defendant's request should not be destroyed in accordance with the literal meaning of the word, but should be sealed "subject to the power of the Court for good cause shown to open [them] wherein the ends of justice might require it." *Id.* at 95.

It appears to the Court that of these three tests, the most onerous to the Times and Herald is that set forth by the Second District Court of Appeal in *Russell v. Miami Herald, supra.* While the Court is not deciding as a matter of law that the burden is on the Movants to establish that the files should be opened, as opposed to remaining with Russell to show that the files should remain sealed, the

Court finds that even if the most onerous test is applied to the Times and Herald, they have met it.

The Court finds as follows: the Movants have shown that vacation of the orders keeping these files from public inspection, whether the orders at issue are sealing orders or "expunction" orders, serves the public interest; that in absence of the vacation of these orders, there is a substantial probability that the public interest would be harmed; and that there is no less restrictive alternative which would adequately protect and serve the interests at stake here.

The Court is guided by the concurrence of Judge Alternbernd of the Second District Court of Appeal in *Russell, supra.* As he points out, it serves the public interest for the Court to vacate a sealing order obtained upon fraudulent evidence of entitlement to it. *Id.* at 984. While it does not appear that Russell obtained the sealing orders at issue here upon "fraudulent evidence" it does appear that he did not fully disclose their existence to the Tampa courts when seeking sealing and expungement of the records of subsequent criminal charges in that jurisdiction and that this failure bears on the question of whether those Tampa records should now be unsealed. The courts considering whether to unseal Russell's subsequently incurred criminal charges must do so with all of the facts in hand.

Furthermore, Russell has had numerous contacts with the criminal justice system since his initial arrest in this circuit – at least six contacts resulting in his arrest. It therefore does not appear that Russell – in Judge Alternbernd's words, the beneficiary of "judicial grace"

in the form of artificial erasure of history – did not profit from that grace. There is no longer any reason to keep records of his criminal charges secret from the public.

It is, therefore, upon consideration,

ORDERED AND ADJUDGED:

1. That the Motion to Question the Jurisdiction of the Court and Motion to Quash Movants['] Motion to Intervene filed by Richard S. Blunt, Esquire, be and the same is hereby DENIED.

2. That the Motion to Intervene, for Order Consolidating Cases and for Order Unsealing Court Records filed by the Times Publishing Company and the Miami Herald Publishing Company be and the same is hereby GRANTED.

3. The Court grants Russell a thirty-day grace period to file a notice of appeal during which time the files will remain sealed. If no notice of appeal is filed within thirty days from the date of this order, the Clerk is directed to unseal the files and open them for public inspection. If a notice of appeal is filed, this order shall abide the outcome of the appeal.

DONE AND ORDERED this 30 day of May, 1991 in Chambers at Orlando, Florida.

/s/ George A. Sprinkel IV
George A. Sprinkel, IV
Circuit Judge

cc: Alison M. Steele, Esquire
Richard S. Blunt, Esquire
William Vose, Esquire

IN THE CIRCUIT COURT IN AND FOR
THE NINTH JUDICIAL CIRCUIT
STATE OF FLORIDA

STATE OF FLORIDA

v. Case No. 77-1096

JOHN LEWIS RUSSELL, III.

_____/

MOTION TO INTERVENE, FOR ORDER CONSOLIDATING CASES AND FOR ORDER UNSEALING COURT RECORDS

COME NOW the Times Publishing Company ("the Times") and the Miami Herald Publishing Company ("the Herald"), by and through undersigned counsel, and move this Honorable Court for an order permitting them to intervene in the above-numbered case, styled upon information and belief *State v. John Lewis Russell, III,* and in any other criminal cases concerning the defendant Russell, consolidating this case with all other criminal court cases in this circuit in which John Lewis Russell, III is or was a defendant,[1] vacating any orders sealing or expunging court records of these cases and opening such records for public inspection. As grounds for this motion, movants state as follows:

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[1] The movants know only one case number. They believe, however, that there are at least three cases concerning John Lewis Russell, III.

INTRODUCTION

This motion seeks access to judicial records sealed or expunged[2] by 1979 and 1980 orders of the court at the request of the criminal defendant in those cases, John Lewis Russell, III ("Russell"). Well established principles of federal and state constitutional and common law require that these court records be opened for public inspection.

FACTS

The Times is the publisher of the *St. Petersburg Times*, a newspaper of general circulation throughout the West Coast of Florida and elsewhere. The Herald is the publisher of the *Miami Herald*, also a newspaper of general circulation throughout South Florida and elsewhere. Both rely on court records as an important source of information in their routine newsgathering.

John Lewis Russell, III is the founder and Chief Executive Officer of the Bureau of Missing Children, Inc., ostensibly a public charity which solicits monetary contributions from the public at large. After obtaining sealing or expunction orders in at least three cases in this circuit, Russell managed to obtain in the Thirteenth Judicial Circuit (Tampa, Florida) similar orders perpetually withdrawing from public inspection court records of a 1979 felony carrying a concealed firearm charge (along with

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[2] Under the dictates of *Johnson v. State*, 336 So.2d 93 (Fla. 1976), "expunction" of court records denotes a permanent sealing subject to unsealing for good cause. *Johnson* means that court records are not to be destroyed.

the misdemeanor carrying a concealed weapon charge flowing from the same incident), a 1981 grand theft charge, and a 1984 possession of cocaine and paraphernalia charge.[3]

Upon information and belief, on July 9, 1975, the Orlando Police Department arrested Russell on charges of carrying a concealed weapon and disorderly conduct. On December 5, 1979, the Ninth Judicial Circuit entered an order sealing the court file concerning this incident. December 27, 1975, the Orange County Sheriff's Office arrested Russell on a worthless check charge. On February 4, 1980, the Ninth Judicial Circuit entered an order sealing the court file. Upon information and belief on April 27, 1977, Russell was arrested on a charge of grand larceny. The incident resulted in Ninth Judicial Circuit

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[3] Russell was originally charged in Tampa with carrying a concealed firearm. He pled nolo contendere to a misdemeanor carrying a concealed weapon charge, adjudication was withheld, and he obtained orders sealing the felony and misdemeanor court files on June 6, 1980 and October 3, 1980, respectively. The 1981 grand theft charge was dismissed pursuant to 3.190(c)(4), Fla.R.Cr.P., and court records were sealed by order dated July 6, 1982. Prosecutors issued a Letter of Release to Russell in connection with his 1984 cocaine arrest, and court records relating to the case were sealed on December 4, 1984. According to Russell, these orders also sealed the records of other criminal justice agencies. The Herald's request to unseal the Tampa court records is currently pending before the Second District Court of Appeal. Portions of the proceedings in the Second District Court of Appeal and the Thirteenth Judicial Circuit in which this information came to light are attached to this motion. The Times' request for access to the other law enforcement agency records is also pending before the Second District at this time.

Case No. 77-1096. On February 4, 1980, the court file was sealed pursuant to court order.[4]

MEMORANDUM OF LAW

A. The Times and the Herald Have Standing to Intervene and Request the Unsealing of Records.

The Florida Supreme Court has held that the public generally should have unrestricted access to all judicial proceedings, including court records, and the news media has standing to question the validity of a court order restricting public access because their ability to gather news is directly impaired or curtailed by such an order. *Miami Herald Publishing Co. v. Lewis*, 426 So.2d 1, 4 (Fla. 1982); *State ex rel. Miami Herald Publishing Co. v. McIntosh*, 340 So.2d 904, 908 (Fla. 1977).[5] This view comports with that of the United States Supreme Court. *See, e.g., Richmond Newspapers v. Virginia*, 448 U.S. 55 (1980).

Thus, the movants do not seek to intervene to obtain some special privilege beyond that accorded generally to

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[4] The February 1980 order sealing or expunging the grand larceny arrest was obtained in Case No. 77-1096. The same order may have sealed or expunged the 1975 worthless check arrest.

[5] *See also, Russell v. Miami Herald Publishing Co.*, 570 So.2d 979 (Fla. 2d DCA 1990) (holding that trial court had jurisdiction to rehear and vacate expungement orders, *Johnson v. State*, 336 So.2d 93, 95 (Fla. 1976), and that Herald has standing to intervene in criminal cases to seek that relief). Furthermore, in that case, the Herald also asked that three separate, sealed criminal cases be consolidated for purposes of a request for access, and this relief was granted, even though two different trial court judges in separate sections of the court had entered the various sealing orders.

the citizens of this State. They seek only to vindicate the public's rights to access to governmental records.

B. The Sealings in this Case Improperly Deny the Public its First Amendment Right of Access to Court Records of Completed Criminal Proceedings.

1. Sealing and Expunging Court Records Infringes on First Amendment Protections.

The public has a Constitutional right of access to judicial proceedings. *See, e.g., Press-Enterprise Co. v. Superior Court,* ___ U.S. ___, 106 S.Ct. 2735 (1986) (*Press-Enterprise II*) (public has First Amendment right of access to transcript of closed preliminary hearing in criminal case); *Press-Enterprise v. Superior Court,* 467 U.S. 501 (1984) (*Press-Enterprise I*)[,] (public has First Amendment right of access to transcripts of jury voir dire proceeding closed by court order); *Globe Newspaper Co. v. Superior Court,* 457 U.S. 596 (1982) (public has First Amendment right of access to courtroom during testimony of juvenile victim of sex offenses); *Richmond Newspapers v. Virginia,* 448 U.S. 555 (1980) (closure of trial violated First Amendment). This right of access is equally applicable to court records in criminal cases. *See In re Globe Newspaper Co.,* 729 F.2d 47 (1st Cir. 1984); *Matter of New York Times,* 828 F.2d 110 (2d Cir. 1987); *United States v. Smith,* 776 F.2d 1104 (3d Cir. 1985); *In re Washington Post Co.,* 807 F.2d 383 (4th Cir. 1986); *United States v. Peters,* 754 F.2d 753 (7th Cir. 1985); *Associated Press v. United States District Court,* 705 F.2d 1143 (9th Cir. 1983).

In Florida, the courts have long held that the common law of this state accords the public, including the news media, a right to access to judicial records and court proceedings. *See Barron v. Florida Freedom Newspapers,* 531 So.2d 113 (Fla. 1988) (right to civil divorce records); *Bundy v. State,* 455 So.2d 330 (Fla. 1984) (access to criminal proceeding); *Miami Herald Publishing Co. v. Lewis,* 426 So.2d 1 (Fla. 1982) (access to sealed suppression hearing documents); *Sarasota Herald Tribune v. Holtzendorf,* 507 So.2d 667 (Fla. 2d DCA 1987) (access to documents relating to sentencing of criminal defendant). In fact, Florida courts stressed the importance of open judicial proceedings and records even before the United States Supreme Court spoke on the contours of the First Amendment right to access. *See e.g., Tallahassee Democrat, Inc. v. Willis,* 370 So.2d 867 (Fla. 1st DCA 1979) (invalidation of blanket order sealing depositions in criminal and civil actions)[;] *News Press Publishing v. State,* 345 So.2d 865 (Fla. 2d DCA 1977) (striking down restrictions on public access to filed criminal depositions after finding no compelling reason for sealing); *Miami Herald Publishing Co. v. Collazo,* 379 So.2d 333 (Fla. 3d DCA 1976) (unsealing of settlement agreement in civil action concerning person shot by Miami police). Courts have recognized the right to and importance of public access to completed criminal and civil proceedings, as well as to proceedings in progress. *Globe Newspapers v. Polaski,* 868 F.2d 497 (1st Cir. 1989); *Gonzalez v. State,* 565 So.2d 410 (Fla. 3d DCA 1990); *Goldberg v. Johnson,* 485 So.2d 1386 (Fla. 4th DCA 1986).

Public access to governmental records and proceedings is the cornerstone of our system of enlightened self-government. Without access to these important sources of

information about government operations, the public and press could not monitor functioning and the performance of their government institutions. As the United States Supreme Court explained in *Sheppard v. Maxwell*, 384 U.S. 333, 88 S.Ct. 1507 (1966):

> A responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field. Its function in this regard is documented by an impressive record or service over several centuries. The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism. . . . There must be some compelling reasons before some or all of the records of a court proceeding may be sealed.

See also, Florida Freedom Newspapers, Inc. v. Sirmons, 508 So.2d 462 (Fla. 1st DCA 1987) (dissolution of marriage litigant's interest in keeping private information related to present and future financial support "not sufficiently compelling" to justify closure; public access essential to preserving independence and integrity of judicial process). It is therefore appropriate for this court to evaluate Russell's sealings against the backdrop of the tradition and importance of openness.

2. Russell could not meet and cannot meet the constitutional and common law requirements for sealing judicial records.

The United States Supreme Court has established that in order for closure of court records or proceedings

to comport with constitutional and common law access standards, the proponent of closure must show that (1) closure serves a compelling interest (2) there is a substantial probability that, in the absence of closure, that compelling interest would be harmed; and (3) there are no alternatives to closure that would adequately protect that compelling interest. *Press Enterprise Company v. Superior Court,* 106 S.Ct. at 2743. The Florida Supreme Court has established a similar, but arguably more stringent test: for closure to be permissible, the proponent must show that (1) closure is necessary to prevent a serious and imminent threat to the administration of justice; (2) no less restrictive alternatives are available; and (3) closure would be effective in protecting the rights of the accused, without being broader than necessary to accomplish this purpose. *Bundy v. State,* 455 So.2d 330 (Fla. 1984).

Other cases have fleshed out the meaning of these tests. The first prongs can only be met by a particularized showing of a compelling *governmental* interest justifying closure. *See, e.g., Miami Herald Publishing Co. v. Lewis, supra.* While in some circumstances a defendant's right and the government's interest in a fair criminal trial under the Sixth Amendment might present a compelling governmental interest outweighing the First Amendment's and common law's right of public access, Sixth Amendment interests do not do so automatically. Case-by-case balancing of the interests is required. *See Miami Herald v. Lewis, supra.*

By contrast, the purely private interest of an individual in protecting himself from embarrassment or maintaining his privacy is not an interest of similar stature. These claims do not rise to the level of a "compelling

state interest" or one harm to which is a "serious or imminent threat to the administration of justice" so as to justify closing court records or proceedings. *See, e.g., Globe Newspaper Co v. Superior Court,* 457 U.S. 596, 102 S.Ct. 2613 (1982) (circumstances in which public can be barred from criminal trials are limited; privacy interests *vel non* are not sufficient); *Smith v. Daily Mail Publishing Co.,* 443 U.S. 97, 99 S.Ct. 2667 (1979) (interest in protecting juvenile offender not sufficient to justify punishment of news media for publication of name); *Landmark Communications, Inc. v. Virginia,* 435 U.S. 829, 98 S.Ct. 1535 (1978) (applying three-part test in analysis of publication of information about complaint before Virginia Judicial Inquiry and Review Commission; Commission and judicial system itself are matters of public interest). As one Florida court has observed:

> A litigant's preference that the public not be apprised of the details of his litigation are not grounds for closure. . . . Were it otherwise, we suggest that a large percentage of the court proceedings in this nation would be closed.

Goldberg v. Johnson, 485 So.2d 1386 (Fla. 4th DCA 1986) (unsealing records of completed litigation). Moreover, individuals simply have no expectation of privacy in arrests or subsequent criminal actions. *Paul v. Davis,* 424 U.S. 693 (1976) (reputational interests of *acquitted* defendant not entitled to constitutional protection; no privacy right in records of arrest).

Furthermore, the Florida's Third District has explicitly recognized that the public's interest in access to the criminal records of persons in positions of public trust justifies the denial of a request for expunction. In

Gonzalez v. State, 565 So.2d 410 (Fla. 3d DCA 1990), the court upheld a trial court's refusal to expunge records of a City of Miami firefighter's arrest for unlawful purchase of cocaine, even though adjudication had been withheld, stating "there is a compelling interest in knowing the character of public employees who serve the community . . . Accordingly, it is within the trial court's discretion to find that the public has just as much right to know of the criminal records of existing public employees as it does to know of the criminal records of those seeking a position of public employment or trust[.]" *Id.* at 411-12.

The courts have thus recognized that public access to governmental records serves the public's interests in monitoring government; closure generally disserves the public interest. Thus, because of the importance of public access to information which concerns the operation of governmental institutions, a court can deny public access for only the weightiest of reasons.

The "no less restrictive alternatives" and "no broader than necessary" prongs of the First Amendment and common law balancing tests generally concern the scope or duration of a closure order. An example of an order which satisfies this standard is one restricting access to records in a criminal case until the moment the jury is sworn, at which time jury members can be shielded from publicity about the case by means other than restricting public access (such as instructions not to discuss, read or listen to news accounts of the trial or even sequestration). *See, e.g., Miami Herald Publishing Co. v. Lewis, supra; News-Journal Corp. v. Foxman*, 559 So.2d 1227 (Fla. 5th DCA 1990) (because purpose of gag order was protection of defendant's right to fair trial by impartial jury, order

must terminate upon jury selection and sequestration); *Reiter v. Mason*, 563 So.2d 749 (Fla. 3d DCA 1990) (gag order, implicating First Amendment interests terminated and court file unsealed because information entered public domain [through] appellate court opinion).

None of the usual justifications for closure are present with respect to this court's records concerning Russell's criminal history. He cannot assert a Sixth Amendment interest to countervail the overwhelming First Amendment and common law requirements of openness, much less that public perusal of his records would present a serious and imminent threat to the administration of justice.[6] Accordingly, Mr. Russell cannot meet the test for closure and his records should be opened for public inspection.

3. Russell must bear the burden of justifying continued secrecy.

Because of the important constitutional and common law interests at stake, Russell must bear the burden of justifying closure not only when closure is originally sought but also when closure is subsequently challenged,

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[6] In fact, as discussed more fully below, it is clearly a serious threat to the administration of justice for this court's records concerning Russell to remain sealed. After convincing this court that it should seal its records of his criminal past, Russell went on to further exploits in Tampa, including three additional incidents of arrests and the founding of an ostensible public charity through which he solicited millions of dollars from members of the public, a public hampered by court order from investigating his background.

as here. Other courts have so held, including the Florida Supreme Court. *Barron v. Florida Freedom Newspapers, Inc.*, 531 So.2d 113 (Fla. 1988). In *Barron*, the court indicated that the burden of proof in proceedings to determine access to court records must always rest on the party seeking closure in the first instance or continued closure because of the presumption of openness that attaches to judicial records and proceedings. Moreover, a factor in the reasoning of these courts has been that the proponent of unsealing, such as the Times and the Herald here, is handicapped in seeking access by his very lack of information, while the subject of the records and proponent of closure has the overwhelming advantage of knowing what is in them.[7] *See*, e.g., *Barron, supra; Reiter v. Mason*, 563 So.2d 749, 751 (Fla. 3d DCA 1990) (citing *Barron* for continuing burden on proponent of closure to justify it if challenged). Russell clearly cannot meet this burden at this juncture, especially given his subsequent criminal charges in Tampa.

The fact that Russell may have sought and obtained the court orders at issue here pursuant to a statute which provided for the sealing or expunging of his "record of arrest" is not determinative, or even significant in this case. At the time when Russell sought and obtained orders from this court sealing his records, Section 901.33,

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[7] The Second District Court of Appeal has held that sealings several years old must be afforded a presumption of correctness. *Russell v. Miami Herald*, 570 So.2d at 983. The case cited in the opinion for this proposition, *Tallahassee Democrat, Inc. v. Willis*, 370 So.2d 867 (Fla. 1st DCA 1979), does not so hold. Furthermore, the Florida Supreme Court has indicated that a different test, and a lower burden, apply. *See infra*, Section C.2

Fla. Stat. (1979), entitled "Arrest records; expunging; exceptions." stated as follows:

> If a person who has never been convicted of a criminal offense or municipal ordinance violation is charged with a violation of a municipal ordinance or a felony or misdemeanor, but is acquitted or released without being adjudicated guilty, he may file a motion with the court wherein the charge was brought to expunge the record of arrest from the official records of the arresting authority. Notice of such a motion shall be served upon the prosecuting authority charged with the duty of prosecuting the offense and upon the arresting authority. The court shall issue an order to expunge all official records relating to such arrest, indictment or information, trial and dismissal or discharge. However, the court shall require that nonpublic records be retained by the Department of Law Enforcement and be made available by said department only to law enforcement agencies in the event of a future investigation of said person relative to a pending charge, indictment, or information against or upon said person for an act which, if committed, would be an offense similar in nature to the offense for which said person had been charged and not found guilty. The court shall not enter an order expunging the records as above provided when there are several acts, or said person has been charged with several offenses originating out of or related to the offense or offenses for which such person had been charged and not found guilty, and when the charge and adjudication of nonguilt did not include all such charges or all such several acts. . . .

The flaws in any assertion by Russell that he was *entitled* by statute to orders sealing his court records are clear. First, the statute does not mention court records. It provides for sealing or expunction only of a defendant's "record of arrest"; it does not purport to provide for sealing of every document reflecting an individual's intercourse with the criminal justice system. Thus, to the extent this court may have misread the statute in 1979 and 1980, its orders sealing the entire court files were entered in error and should be vacated. Second, the Legislature cannot provide for sealing of court records in contravention of the higher authority, the First Amendment, the Florida Constitution, and the long-established common law of this state, which prescribes the rules for sealing judicial records. If the statute under which Russell's expunctions were presumably granted is read in isolation from these constitutional and common law principles, the statute is unconstitutional.

The statute, in fact, is silent regarding unsealing and is silent regarding the burden of proof. Russell cannot twist this to say that once a record is sealed pursuant to a request under this statute, it can never be unsealed.

C. Russell's subsequent exploits meet any test the movants might be required to bear to vacate sealing or expunction orders.

1. The "Public Interest" Test.

As discussed briefly above, the Herald is seeking in another circuit to open to the public records of additional charges against Russell in 1979, 1981 and 1984. The Second District Court has ruled that in order to successfully

challenge a court record expunction order granted pursuant to the statute, the challenger must show (1) vacation of the order would serve the public interest; (2) there is a "substantial probability" that, in absence of vacation of the closure order, the public interest would be harmed; and (3) no less restrictive alternatives are available. *Russell v. Miami Herald, supra.* That case was remanded to the trial court for application of the new test and is now on appeal again. Almost six months into that appeal, it came to the attention of the *St. Petersburg Times* that Russell had obtained at least three sealings in this circuit before he ever was arrested in Tampa.

Beyond the fact that the organizer of a public charity ostensibly for the benefit of missing children, an undertaking with enormous emotional appeal to potential donors, has been arrested not three times but six – two of them pursuant to outright theft charges, one a worthless check and another involving cocaine – the extraordinary significance of the now-sealed Ninth Circuit records lies in this: the sealing and expunction statute in effect at the time Russell sought and obtained his Tampa sealings required him to swear under oath in writing that he had not obtained any sealings or expunctions pursuant to it or its predecessor, § 901.33, *Fla. Stat.* (1979) in order to apply for and qualify for relief.[8] Although the movants do not

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[8] Section 943.058, *Fla. Stat.* (1980) required that a person seeking a sealing or expunction of criminal records submit a sworn statement to the best of his knowledge he is eligible for the relief. § 943.058(8). The statute further provided that a subject of criminal arrest records *could not* deny or fail to acknowledge the events covered in previously sealed records when petitioning for additional sealings or expunctions.

have access to the affidavits Russell had to file in those cases, there is reason to believe that Russell did not disclose his Ninth Circuit sealings when seeking that relief in the Thirteenth Circuit.

The existence of Russell's Orlando criminal history had never been mentioned or revealed at any stage of the proceedings in the Tampa cases. In the Thirteenth Circuit and Second District proceedings, Russell has been and is presently represented by attorney Richard Blunt.[9] According to Mr. Blunt's representations to the Thirteenth Circuit and to the Second District Court of Appeal, he has been Mr. Russell's attorney since 1980 and in fact sought on Russell's behalf the sealing and expunction of Russell's 1981 grand theft charges. Mr. Blunt has represented to the courts that Russell did not commit any fraud on the Tampa courts and was fully forthcoming about his prior sealing history when he sought subsequent sealings.

Yet when a news reporter brought Russell's Orlando arrests and sealings to Mr. Blunt's attention in April 1991, Mr. Blunt publically stated Russell did not tell him about them.[10] See Exhibit A, attached. If Russell's lawyer did not know about them when he sought the 1981 sealing,

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§ 943.058(6)(b)3. Moreover, one of the requirements Russell had to meet to be eligible for sealings in Tampa was that he had never obtained one before. § 943.058(2)(c).

[9] Russell, through Mr. Blunt, has been served with a copy of this motion, as reflected on the certificate of service.

[10] Mr. Blunt further remarked, "Sometimes clients, in a variety of circumstances, are selective about what they say. . . . I didn't know then, and I don't know now."

Russell could not have disclosed them in the affidavit his lawyer presented to the court. Russell apparently has perpetrated the very fraud that Judge Altenbernd of the Second District specifically recognized would clearly satisfy the "public interest" test.

Significantly, a sealing or expunction under § 943.058 or its predecessor legally entitles the recipient of this legislative and judicial grace *to deny that he has ever been arrested.*[11] The prospect that Russell did indeed obtain additional sealings of criminal court records in another jurisdiction by failing to disclose that he had already obtained three sealings in this jurisdiction must be of great concern and interest not only to the public but to this court.[12]

Moreover, as the exhibits to this motion demonstrate, there is a significant degree of interest among members of the public, the Legislature and those in the court system in examining the operation and abuse of the statute allowing sealings and expunctions. The public must have

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[11] There are exceptions to this permission. One of them is when the prior recipient of a sealing or expunction pursuant to the statute seeks another one.

[12] Furthermore, the movants expect that it will be of great interest and concern to the trial court in Tampa. However, because Russell has repeatedly complained that the movants have failed to present any "evidence" supporting their requests for access to his Tampa records, it is essential that this court provide the movants, and the Thirteenth Judicial Circuit, with the Orlando court files as evidence, official copies of the sealing orders this circuit entered, or at the very least, official recognition that the Russell court files existed and have been sealed.

as much information as possible to reach valid conclusions about whether the statute and the government agencies administering it are functioning in accordance with the will of the people. This court should not deny the public that information, especially given the apparent abuses of the statute perpetrated by Russell himself.

2. The "Good Cause" Test.

In *Johnson v. State*, 336 So.2d 93 (Fla. 1976), the Florida Supreme Court directed that instead of "expunging" the court records in accordance with the literal interpretation of the statute, "we direct the learned trial judge to seal Appellant's record and retain it sealed *subject to the power of the court for good cause shown* to open it wherein the ends of justice might require it." *Id.* at 95. Thus, at the time the Second District formulated its test for unsealing a court record under the statute, the Florida Supreme Court had already established the applicable test. If this court chooses to apply any test other than the three-part First Amendment test discussed in Section B, *supra*, – which must be borne by Russell – it should be the test set forth by the Florida Supreme Court. *See also Barron, supra.*

The specter of fraud on the Tampa courts clearly satisfies the good cause test. Any more weighty or profound "ends of justice" are difficult to imagine. But even apart from the implication (at the least) that Russell filed affidavits in Tampa unlawfully omitting material information, good cause exists for unsealing the records in these cases.

The statute at issue was intended to give the first time offender a "break" – to permit the perpetrator of single indiscretion to live an otherwise blemish-free life without the stigma of an arrest record. Russell, a person who has assumed a position of public trust, in fact has taken repeated advantage of a compassionate legislature, not to mention the courts, and has been granted *at least six times* the right to deny that he has ever been arrested. This court should not permit this behavior to continue.

WHEREFORE, the Times and Herald request that this court permit them to intervene, consolidate the court cases in which Russell was the criminal defendant, vacate the orders sealing those cases, and permit the public to inspect their contents.

/s/ Alison M. Steele
George K. Rahdert
Fla. Bar No. 213365
Thomas H. McGowan, Esq.
Fla. Bar No. 98632
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was furnished by regular U.S. Post to Richard S. Blunt, Esq., 101 South Armenia Avenue, Tampa, FL 33609, to Ronald N. Ficarotta, Esq., State Attorney's Office, Courthouse Annex, Hillsborough County Courthouse, Tampa, FL 33601, and to William Vose, Esq., State Attorney's Office, PO Box 1673, Orlando, FL 32802 this[ ] 8th day of May, 1991.

/s/ Alison M. Steele
Alison M. Steele, Esq.

IN THE CIRCUIT COURT, NINTH JUDICIAL CIRCUIT, CRIMINAL JUSTICE DIVISION IN AND FOR ORANGE COUNTY, FLORIDA

STATE OF FLORIDA,
Plaintiff,
vs.
JOHN LEWIS RUSSELL III,
Defendant.
_____/

CASE NO.
CR77-1096
CR75-3275

[HEARING ON]

MOTION TO INTERVENE

BEFORE

THE HONORABLE GEORGE A. SPRINKEL IV

Orange County Courthouse
Courtroom V, Second Floor
Orlando, Florida
May 20, 1991

APPEARANCES:

ALISON STEELE, ESQUIRE,
RAHDERT & ANDERSON
535 Central Avenue
St. Petersburg, Florida 33701
appearing on behalf of Movents

WILLIAM VOSS,
ESQUIRE
State Attorney's
Office

RICHARD S. BLUNT, ESQUIRE
110 South Armenia Avenue
Tampa, Florida 33609
Attorney for Defendant

THE COURT: Motion to intervene. John Lewis Russell, III. All right. Who's going to make argument of the motion?

MS. STEELE: I am, your Honor. I'm Allison Steele from the law firm of Rahdert & Anderson. This is Thomas McGowan (phonetic). We represent the St. Petersburg Times, Times Publishing Company and Miami Herald Publishing Company. I know your Honor read the motion. Briefly, to go over the facts that we have involved here, we have a gentleman who has founded and run a public charity in the State of Florida, solicited over, from what we know, a million dollars from the public at large, and he has done this while having a history of at least six

arrests by authorities in both Orlando and Tampa. He has taken advantage at least six times of various statutes as they have been enacted to permit people to conceal arrest history.

It is generally a statute enacted, first of all, to protect people who were first time offenders. First brush with the law. Give them a clean start. He has had six clean starts.

* * *

THE COURT: Do you have them listed by case number?

MS. STEELE: Well, your Honor, in the 9th [circuit], here in Orlando, I only have one case number. We were only able to determine the case number which related to the grand larceny charge, the last charge.

THE COURT: Am I getting ahead of you or is that one that you have already –.

MS. STEELE: I think I already covered that.

THE COURT: 77-1096.

MS. STEELE: Yes, your Honor.

THE COURT: Okay. The earlier case was in 1975. Or he – well, I have a '75 case here. Of 3275. 75-3275. So that will probably be the concealed weapon, disorderly conduct. Could be the worthless check. Both of those were 1975. Okay. I have those two cases.

MS. STEELE: All right. So you have the '77 case number and '75 case number?

THE COURT: That's correct.

MS. STEELE: Okay.

THE COURT: The '75 was obtaining property by worthless check. CR75-3275.

MS. STEELE: Okay. And as far as we know, we don't have a case number on the carrying concealed weapon, disorderly conduct.

THE COURT: Not that I know of. I don't have anything here that the clerk furnished.

* * *

[MS. STEELE:] The Times and the Herald would argue that the constitutional and common law three-part test, the one the Court is familiar with in [P]ress [E]nterprise, and one I did analyze, is the test that applies here, and that Mr. Russell must bear the burden of meeting the three prongs to keep his records closed.

* * *

MR. BLUNT: This is an area that is fraught with danger for the Court, for the party, for everyone here. I think it is a case that is important, your Honor. The basic position of my client, A, is that we're dealing with a statute that gives him the right to deny under all but very limited circumstances, the existence of prior criminal history. It is also very important to understand that when we're talking about petitions to seal or expunge criminal history records, we're really talking about two different criminal history records. First of all, the court records, and then the other agencies' records.

* * *

THE COURT: Nothing was ever raised concerning these Orlando records?

MR. BLUNT: No, no. So the Hillsborough County cases remain sealed pending this appeal.

* * *

[S]o it is up to the 2nd DCA now whether or not they think the alleged new Orange County problems the press is saying happened – I'm not admitting to – would be relevant. So that's where we stand over in our district, your Honor.

THE COURT: You're not admitting to in what regard?

MR. BLUNT: Not at all. I'm not admitting it is the same person. I'm not admitting anything over here. I'm not admitting it happened, I'm not admitting the people that they think is over here is the same person, I'm not admitting to anything. And the beauty of it, your Honor, is that the law permits me to do that. Even if my client was the same person who got these Orange county expunctions, the law permits me to deny it, permits him to deny it, and that's one of the strange parts of this entire case.

* * *

MR. BLUNT: I want this Court to understand that if one of their arguments is well, he should have disclosed it recently, the law permits us not to disclose those things. That's what we are doing today. Not admitting to it, even if it did happen. The law says we don't

have to. So with that covered, I think it is important to go back and plug in the statutory language that was applicable to the time when these sealings actually happened.

* * *

MR. BLUNT: That's exactly right. Let's just say they have two or three. Doesn't matter. A, my point is that under the statute, it doesn't prohibit multiple expunctions. That's number one. Let's just say that those charges that you have in front of you, your Honor, end up in a non-adjudication discharge, or dismissal. And I don't know. Of course, back then, this statute didn't require a petitioner to file any kind of affidavit. So my theory is that one, two or three, whatever number you have in front of you, assuming that the result was a non-adjudication, those expungements were done lawfully, and within the perview of 901.33. There is nothing illegal about that. And furthermore, after they were done, according to the statute, my client –

THE COURT: Well, now, wait a minute. You're saying they were done according to the statute.

MR. BLUNT: Let's just assume they were. I guess they were.

* * *

[MR. BLUNT:] [F]or the sake of argument, then, Orange County one, two, three, Hillsborough County number one, all gotten under 901.33.

THE COURT: What about Hillsborough number two and three?

MR. BLUNT: I'll get on that. So all of those one, two, three Hillsborough County number one, all done 901.33, and they all met the statutory requirement. So now 943.058 comes into effect, October 1, 1980. That statute makes the distinction, based upon the Johnson case, about the Court's own judicial records, and other agencies' records.

* * *

MR. BLUNT: Criminal history records maintained by FDLE may be ordered expunged only upon a specific finding by a circuit court of unusual circumstances requiring the exercise of extraordinary equity and powers of the Court. Now, I can't say in good faith that that is the most clear wording that the statute could have relative to the legality of multiple sealings. I would point to two different cases, you Honor, that supports my contention that multiple sealings were permissible back then, even for people who had priors.

* * *

THE COURT: But two and three in Tampa don't come under this.

MR. BLUNT: Yes, they do.

THE COURT: But you are saying there was a showing of unusual circumstances requiring the exercise of extraordinary equitable powers of the Court and that therefore, the Court had the authority to do this even in light of having prior expunctions?

MR. BLUNT: Yes. Let me tell you why.

THE COURT: Was there a specific finding by the Court?

MR. BLUNT: Ms. Steele never told you this. The fact of the matter is, in petition number two and three in Hillsborough in the petition – I know because I did one, and I know because I seen [sic] the records and I'm swearing under oath the petition in two and three Hillsborough County says, although the defendant has sought and received prior expungements in Florida within the last ten years, he is entitled to it because of the unusual circumstances. So the fact of the matter, you Honor, in Hillsborough County, there was no fraud there. The statute required a disclosure, John Russell disclosed it, and the petition for expungements for relief were granted. As contemplated by the law, it happened, there was no fraud, there was disclosure. Whether or not the state attorney was sleeping on the job, or whatever, I don't know what happened. But I do know the Court granted it. And it was a lawful petition, it disclosed priors, and what to argue about. Disclosed priors not only in Tampa, but in Orlando. Didn't mention specifics. Didn't have to. Here's why.

In 1988, and current statute we're dealing with now, is that, and you may know this, this statute requires an affidavit to be accompanied – to be attached to the petition. The present law, since 1988, requires that the defendant swear that the – and I'm reading here in subsection (7)(c), the affidavit now says the petitioner has never secured a prior sealing or expunction of records under the section or former section. Okay. so that's the law now, since 1988. The law that was in effect prior to 1980 an affidavit, but no specific, the affidavit that was required

back in the old case said here in subsection eight of the prior, each petition to a Court for sealing of or expunction of criminal history records shall be complete only when accompanied by the petitioner's sworn statement that to the best of his knowledge and belief, he is eligible for such a sealing or expunction. Big difference. What I am saying is –.

THE COURT: Meaning his belief is that requires the extraordinary –.

MR. BLUNT: That's my argument.

THE COURT: That spelled out in the affidavit?

MR. BLUNT: The affidavit requires him to, yes. The affidavit in those cases, the last thing in the affidavit says that the defendant swears to the best of his knowledge and belief his is eligible. That's what it says, exactly. That he is eligible under the statute.

THE COURT: Doesn't say seeking it under section three?

MR. BLUNT: The petition in those two and three in Hillsborough County say that he is going under 943.058 in the unusual circumstances provision.

THE COURT: Okay.

MR. BLUNT: This Hillsborough County two and three, even though the Miami Herald and St. Petersburg Times hated, and really failed to acknowledge it, I don't see how they can. The fact of the matter is, and they should know this, because I've given them copies of those pleadings, John Russell disclosed two and three when he had to. Prior to that, he didn't have to. The law

protected them, your Honor. That's one of the funny parts about this whole case. It is really an artificial means to erase history. If the statute doesn't require disclosure, you don't have to do it. You can't be arrested for perjury.

THE COURT: He didn't disclose the Orange County or 9th Circuit records. What he did was allege that there were unusual circumstances requiring the exercise of extraordinary equitable powers without going further. That's what you allege in your petition.

MR. BLUNT: The petition stated that although he has received prior expunctions in Florida, in the past ten years, didn't get specific. Didn't have to get specific.

* * *

THE COURT: Haven't you forgotten something? Hasn't the 2nd DCA interpreted the statute totally different from what you were interpreting it in argument to me? Concerning the second section and the third section application under the unusual circumstances?

MR. BLUNT: Yes. There is no question that the 2nd DCA has a different opinion. Of course, they don't have to worry about that. Nor do you.

THE COURT: Extent of it says it is wholly inapplicable to the expunctions of court records. But you made the argument and the argument is not in keeping with the 2nd DCA finding at all. That section three must be found in addition to compliance with two A through D.

MR. BLUNT: No questions about that, Judge. The fact of the matter is –.

THE COURT: Had I not read the case, I wouldn't have known whether there was a question about it or not because your representation was that that was the law.

* * *

[MS. STEELE:] You expressed some interest earlier, your Honor, in the petitions to expunge files in Tampa. We happen to have been provided copies of those with some papers filed in the 2nd DCA. And I have them here if you want to take a look.

MR. BLUNT: That's our petition where he disclosed existence of prior expunctions in Tampa two and three.

MS. STEELE: Tampa two and three are ones that have been provided there.

MR. BLUNT: On the bottom there.

MS. STEELE: Nothing had been provided with number one. Paragraph four there indicates that the defendant represents his previous arrests and sealings and expunctions were exclusively business related.

THE COURT: . . . I think it is frankly dodging the intent of the statute to be able to come in and allege general unusual circumstances without going into the details to put the Court on notice of exactly what the facts are. And that's what is attempted to be used by saying that three is read without being controlled by two. By alleging unusual circumstances, quote unquote, just as you have quoted in the petition, it dodges the issue, as far as I'm concerned, of the requirement under two, which I think the 2nd DCA made a correct interpretation of. I'm

not sure how that will affect this decision here, but I think it would have a bearing on my judgment in trying to make a decision as to whether to seal on expunctions. Well, under the new law, only to seal, but only one shot deal [sic].

* * *

MR. VOSS: Your Honor, I'll be very brief. The hour is late.

THE COURT: That's all right. This is an issue that we don't need to worry about the clock.

MR. VOSS: I want to preserve the sheriff's overtime budget.

THE COURT: Okay.

MR. VOSS: Your Honor, if I could just make a few points. I think there is a couple of things I can point out to you that may give you a little information as to the history. As you know, I've been involved in seal[ings] and expunctions since about 1980. I'll be quite extensive [sic] in front of legislature. Was on the criminal procedure rules criminal committee and drafted the forms, and participated in the drafting of the statute back in the early 1980's. And I can tell you that some of the intent, while that's probably unfair, I'm not going to try to get up here and sound as an expert. I'll show you some evidence as to some of the intent. First of all, in Orange county, it was really never an issue as to whether or not 901.33 authorized more than one sealing or expungement. I've got for you two letters from Chief Judge Muszinsky, one dated November 18, 1975, and one dated October 27, 1986, that basically were somewhat, knowing the manner of Judge

Muszinsky when he was the chief judge, advising members of the judiciary as to their use of the sealing and expungement statute 901.33. . . . Also in here it cites that basically the purpose of the sealing and expungement statute is for first offender only.

* * *

MR. VOSS: Well, currently now, or at least after 1980. It is obvious that the supreme court agreed that, if you will look at the order, the petition and the order to expunge or seal, none of this means (sic) anything about special circumstances. And the reason is the 2nd District again is right, that that special section only deals with FDLE records. Hasn't got a thing to do with court records. And that's the only thing these orders have anything to do with.

* * *

MR. VOSS: . . . I would just argue in conclusion that I believe that the Court should unseal these records, because I believe that intentionally or unintentionally, the Court in Hillsborough County did not have all the information, the information in front it should have had to make the decision in regards to at least the last two sealings.

* * *

MS. VOSS: I won't belabor the point, your Honor. It is position of State of Florida we feel you should unseal these records and provide them, well, I guess provide them to whomever can utilize them in pre-opening, if appropriate, in the Hillsborough County, the sealings or expunctions. I believe, I've been led to believe

at least maybe only in the newspaper, Judge Coe said that he would be interested in knowing this information, even though he recused himself. I'm sure the new judge would like to know this information, because if that general disclaimer in the petition was improper, and if you are not entitled, which I believe that is the law, not entitled to have one if you have another one, there was a fraud committed on the Court. Either intentionally or unintentionally.

* * *

THE COURT: Well, all I'm looking at is a certificate of compliance by the clerk, which says the court order dated February 4, 1980, signed by Judge L. Cornelius, directs the expunction of one defendant charged under case number CR77-1096, and CR75-3275. Well, it says under the last paragraph, number seven, sealed case, in compliance with orders to expunge, and FR – Florida rules of criminal procedure, 3.692. So it sealed the case in compliance with the order to expunge. So now you tell me what that means. But we have the cases. I think if they are expunged, they should be destroyed, frankly. If they are sealed, they should be preserved, but sealed and no one can open them except under court order. So these have been sealed, evidently, because I have the records here, sealed across the back, signed by John Fausnaught as chief deputy clerk, said case sealed pursuant to court order, Florida Rules of Criminal Procedure 3.692. Open only by court order.

So I'm vacating the order to seal, but I would also add that if it was an order to expunge, I would also vacate that order as well.

* * *

(THEREUPON, the proceedings were concluded).

CERTIFICATE

STATE OF FLORIDA)

COUNTY OF ORANGE)

I, JACKIE L. FOLK, RPR, Official Court Reporter of the Seventh Judicial Circuit of Florida, do hereby certify pursuant to Florida Statute 29, that I was authorized to and did report in stenographic shorthand the foregoing proceedings and that thereafter my stenographic shorthand notes were transcribed to typewritten form by the process of computer-aided transcription, and that pages 2 through 79 contain a true and correct transcription of my shorthand notes taken therein.

WITNESS MY HAND this 8 day of July, A.D. 1991, in the City of Orlando, County of Orange, State of Florida.

/s/ Jackie L. Folk
JACKIE L. FOLK, RPR, CM
REGISTERED PROFESSIONAL REPORTER
CERTIFICATE OF MERIT HOLDER

Tuesday, April 9, 1991
St. Petersburg Times

Abusing right to hide truth

■ A man had three arrest records sealed in Tampa – after three were sealed in Orlando. The law allows one record to be sealed.

By BOB PORT
and SUSAN TAYLOR MARTIN
Times Staff Writers

TAMPA – For two years, John Lewis Russell III has waged a relentless courtroom battle with the press. It's a battle over Russell's right to hide the truth.

The press wants to unseal records of the three times Russell was arrested in Tampa. The press argues that to seal the records was improper because the statute allows only one sealing per person. Russell wants the records concealed from the public forever. He argues that his multiple sealings are perfectly legal.

The case, still tied up in appeals, grew out of a newspaper expose that told how Russell hired criminals to work in a boiler room charity for missing children.

But wait a minute.

It turns out that Russell failed to mention something. Before having his three arrest records sealed in Tampa, Russell had three *other* arrest records sealed in Orlando.

In 1975, the Orlando Police Department charged Russell with carrying a concealed weapon. Later that year, the Orange County Sheriff's Office arrested him on

a worthless check charge. In 1977, he was arrested and charged with grand larceny.

None of the arrests led to a conviction. All of them were sealed. The *St. Petersburg Times* learned of these sealed cases by checking public records.

In what has become one of the state's biggest court appeals involving judicial orders to seal records, not one of these prior sealings has been mentioned.

Richard S. Blunt of Tampa, Russell's attorney since 1980, said his client never told him about sealed cases in Orlando.

"I'll be darned," he said.

"Sometimes clients, in a variety of circumstances, are selective about what they say," Blunt said.

"I didn't know then, and I don't know now."

Russell, who reportedly is out of the country, did not return telephone messages.

In any event, Russell didn't mention the Orlando sealed cases while his attorney argued before Florida's 2nd District Court of Appeal to keep Russell's Tampa cases sealed. Russell didn't mention them while his attorney tried to convince judges to force the *Miami Herald*, which had done the expose, to reveal its sources.

And he didn't mention them while his attorney tried to hold Tampa prosecutors in contempt last year upon discovering they had only sealed, rather than destroyed, the files at issue.

Meanwhile, his attorney has been privately trying to have Russell's Tampa police records destroyed even while the press has been openly arguing in court to have them made public.

When three plus three equals zero

In April 1989, the *Herald* wrote about The Bureau of Missing Children Inc., a charity that Russell founded to raise money through ads and telephone solicitations. Donors believed their money was being used to support private detectives searching for missing children.

Despite $1.5-million collected over several years, evidence suggested Russell's charity had found fewer than 15 children. The *Herald* said much of the money went to questionable expenses, including the salary of a go-go dancer who ran the Miami office. The newspaper said Russell had distributed a phony resume and used phony Social Security numbers. Russell has since disassociated himself from the organization.

The *Herald*'s story also disclosed Russell's hidden arrest history in Tampa: In 1979, police charged him with carrying a concealed weapon. In 1981, police charged him with grand theft. In 1984, police charged him with possession of cocaine. None of the arrests led to a conviction. Each separate case was ordered sealed or expunged.

Florida's sealing statute was intended to give someone who made a youthful mistake a chance to start with a clean slate. The statute requires that the person not be convicted of the crime he wants sealed, and it forbids

more than one sealing. Lawmakers wanted to give people a second chance, not a third or fourth chance.

They never intended for someone to be able to seal or expunge an entire six-part police "rap sheet." But that's what Russell did. To prevent this, lawmakers required defendants seeking a record sealing to first swear under oath that they had never sealed a record before.

How did Russell dodge that requirement? How could he seal records in Orlando and again in Tampa? How could judges be so easily manipulated?

"No comment" was the reaction from Harry Lee Coe III, the Tampa circuit judge who sealed two of Russell's Tampa cases and now refuses to unseal any of them.

"I guess I shouldn't be surprised anymore" was the reaction from Chris Hoyer, Tampa's chief assistant state attorney. "So much has been hidden by this law, it's hard to be shocked."

"It p--- me off it happened in my circuit," said Bill Vose, Orlando's chief assistant state attorney, who questions the wisdom of sealing one, let alone six criminal cases.

The bottom line: John Lewis Russell III has been arrested on six charges – two separate charges of carrying a concealed weapon, two separate charges of grand theft, issuing a worthless check and possession of cocaine.

But the state of Florida says he is allowed to swear that he has never been arrested.

Knowing the difference

In 1989, the *Herald* sued to have Russell's Tampa court files opened. Last year, the press sued to open Russell's Tampa police files as well.

Meanwhile, unknown to his press adversaries, Blunt began pressuring the Tampa Police Department to destroy, if it hadn't already, any "sealed" record it had for Russell.

Florida law allows for the sealing, that is, the removal from public records of a person's criminal history, if the person is not formally convicted.

In limited cases, the law allows a judge to order the expunction, that is, the destruction of records. However, many judges have signed orders that say "seal or expunge" while they really intend for the records to be "sealed." Some judges have signed orders that say "expunge" while they really intend for records to be "sealed."

Meanwhile, criminal defendants can use the ambiguous language to try to get their records destroyed.

Despite pending lawsuits from the press, Blunt used exactly this confusion last November and wrote to Tampa police Maj. Kenneth Taylor. He asked whether Russell's records had, in fact, been "expunged," as Blunt claimed the judicial orders required.

Unsatisfied by Taylor's response, Blunt wrote to the Tampa city attorney's office in January, advising that "expunged, of course, means destroyed or obliterated, as opposed to 'sealed.' "

"My fear is that the Tampa Police Department does not know the difference," Blunt wrote.

Meanwhile, the Tampa judge presiding over the press lawsuits has said he never intended for Russell's records to be destroyed – just sealed.

In an order Blunt prepared for Coe to sign, Blunt had typed "expunged." Coe or his secretary scratched out the words "expunged" and wrote in "sealed."

Judge Coe has had the case for two years, and his decisions have gone back and forth.

When the newspapers originally sued, Coe agreed and ordered the court files opened up. Then Russell appealed. The 2nd District Court of Appeal, searching for a way to resolve such disputes, established guidelines for when to seal a case and ordered Coe to apply them to Russell's case.

In general, the appeals court said, court files ought to stay open to the public. To decide whether they should be sealed, the appeals court said, Coe must weight the public's basic right to see court files against Russell's need to conceal them.

After a lengthy, rambling discourse, Coe announced in court that he had changed his mind and decided not to unseal Russell's court files "because everybody knows everything anyway."

But everybody didn't know everything.

Coe wouldn't rule

As the *Times* subsequently reported, former City Attorney Joseph G. Spicola Jr. had privately represented Russell to get the sealing of his 1984 cocaine arrest – What turns out to be Russell's sixth sealed arrest record, Spicola had done this even while his city attorney's office was advising the Tampa Police Department, which had arrested Russell, that multiple sealings violate Florida statutes.

And, the *Times* reported, Coe had let Russell's last arrest stay sealed even after being sent a letter of protest from the Tampa Police Department advising him of Russell's prior sealings in Tampa.

Meantime, the newspapers continued their effort to find out about Russell's hidden past. They sued to open Russell's police files. But from October through January, Coe sat on it: He refused to sign any official order.

The *Times* had to ask appeals judges to order Coe to act. They did. Only then, Coe signed an order declaring that the police files must stay closed.

Meanwhile, the Tampa city attorney's office, not made aware of the case, has since assured Blunt that Russell's police records "were indeed expunged."

The case stands as an example of the blatant abuses that have occurred with Florida's sealed records law as reported in a five-part *Times* series last month called "Hiding the Past." More than 67,000 people have sealed their arrest records in Florida, the *Times* reported: Records are sealed for people who plead guilty to crimes and the FBI routinely destroys its records of the Florida

cases. Criminals are free to leave the state with their federal rap sheet cleansed.

The *Times* has appealed both of Coe's latest decisions and is continuing to seek to have both Russell's Tampa court records and his Tampa police records – whatever remains of them – opened.

Now, the *Times* and *Herald* will go to Orlando to try to have Russell's records unsealed there, too.

"It is outrageous that a citizen can take repeated advantage of a statute that was meant to benefit first-time offenders," said *Times* and *Herald* attorney Alison Steele.

"Especially a citizen who holds himself out as running a public charity for the benefit of missing children. It's frightening."

Sunday, March 24, 1991
St. Petersburg Times

Hiding the past

By SUSAN TAYLOR MARTIN, DAVID BARSTOW
CHUCK MURPHY and BOB PORT
Times Staff Writers

The St. Petersburg Times

James E. Regan is accused of a sick and serious crime.

A 13-year-old boy said Regan picked him up a year ago, drove behind Largo Middle School and masturbated

as they sat in Regan's Grand Am. Then, the youth said, Regan paid him $15 to masturbate, too.

The details were sordid. But the case was weak.

Prosecutors knew the boy was a shaky witness. He had been in trouble before. He kept changing his story.

Regan, though, was an assistant vice president for a major bank. When police ran a criminal background check, he came up clean. Even if found guilty, he might get probation because records showed he was a first offender.

But Regan, 45, had an ugly secret in his past. For almost a decade, the state of Florida helped him hide it.

In 1981 he was arrested in Tampa, accused of having oral sex with an 11-year-old boy. Regan pleaded no contest and got the case sealed; the records vanished from public view. Pinellas prosecutor Nick Mooney – who is handling Regan's current case – learned about the old one only because of a story on television.

But, Mooney says: "I didn't think I could use it."

Last week, just a day before Regan was to appear in court, Mooney discovered he was wrong. He *could* use the 1981 case to argue for a stiffer sentence if Regan is found guilty. Now he faces up to seven years in prison; had his past not come out, he might have avoided jail altogether.

This time, prosecutors got the break.

Most of the time, it's the crooks.

A six-month *St. Petersburg Times* investigation found that tens of thousands of people are hiding their criminal

backgrounds from police, employers and potential victims. And they do it legally, under a statute that lets them deny they were ever arrested.

The effect?

■ The state hires a man once charged with armed robbery and urinating in public, and assigns him to work with foster children.

■ A corrupt zoning official gets a new job, as a county property appraiser.

■ A drug dealer becomes a prosecutor, in a drug court.

■ A burglar runs his own business, a burglar alarm company.

The *Times* investigation shows that Florida's sealing statute has become a nightmare for the criminal justice system. Police hate it, prosecutors bungle it, judges misinterpret it, and the people who seal records don't understand it.

Meanwhile, defense lawyers profit and crafty defendant misuse it to their own ends. They get jobs they shouldn't. When re-arrested, they get probation instead of prison.

Ultimately, the system works against itself. Police – who are supposed to protect society from criminals – are forced to help criminals hide their pasts from society. Justice – which is supposed to be equal – ends up favoring only those who can afford it, usually wealthy, white people.

Other states put strict limits on what crimes can be sealed. Or they require waiting periods to make sure defendants have truly reformed.

In Florida there's no wait and anything can be hidden – charges of rape and robbery, murder and arson, forgery and fraud. People can get cases sealed even if they plead guilty. It's a law, critics say, that may actually encourage crime, not deter it.

"Why don't you call it what it is?" says Pinellas-Pasco State Attorney James Russell. "It's a hiding place for criminals."

Since 1974, at least 68,000 people in Florida have had criminal arrest records sealed, according to a *Times* computer analysis. All of them can legally deny their criminal pasts.

"When you go apply for a job as a bank teller you can lie and say you've never been arrested for theft," says Bill Vose, an Orange County prosecutor. "I think the bank or the Publix grocery store that is hiring you has a right to know you're a thief."

How it really works

The statute was intended to give first offenders a break. For many it works as it should, enabling them to go on to medical school or get a decent job without an isolated mistake shadowing them forever.

Says Paul Zacks, a Broward County prosecutor: "The law is clearly intended to give a benefit to somebody who has otherwise lived an entirely clean and arrest-free and conviction-free life."

That's why the statute says you can get an arrest sealed only if you have never been convicted of a crime. You must disclose a sealed record if you want to become a lawyer, a police officer or work with children in a state-licensed job. And police have access to even sealed records.

That's the way it's supposed to work. This is what really happens:

■ **People get cases sealed even after they've been found guilty of another crime.** In 1984 Lucille Reutti, then a Hillsborough County employee, was charged with shoplifting from a grocery store. In 1986 and 1987, she was arrested on burglary and grand theft charges. Despite her prior conviction, she got both the '86 and '87 arrests sealed.

■ **People fail to disclose sealed records even when it's required.** Marlow Blair was hired by the state Department of Health and Rehabilitative Services (HRS) to work with foster children in Tampa. He didn't tell HRS he had two sealed cases, one for armed robbery. He says HRS never asked. Nor did HRS know that he signed a false affidavit when he tried to get a third case sealed. He still works for HRS.

■ **People get numerous sealings.** John Lewis Russell III had four arrests sealed in Hillsborough County. You may have heard of him – he founded the Bureau of Missing Children and collected $1.5-million in donations, ostensibly to help track down kids. According to the *Miami Herald*, which has joined the *Times* in a lengthy court battle to have his records unsealed, much of the money actually went for questionable expenses –

including the salary of a go-go dancer who ran his Miami office.

The *Times* analysis shows at least 985 people have gotten more more than one case sealed.

■ **Police agencies sometimes DON'T know about sealed records.** When police pick up a person, they check the National Crime Information Computer (NCIC) to see if there is an arrest record anywhere else in the country. But the FBI – which runs NCIC – destroys fingerprint cards and criminal histories of people who get their cases sealed.

"We destroy it as though that arrest never happened," says Bud Mercer of the FBI. "If that was the only arrest the fellow had with us, he would no longer have an arrest record in NCIC."

So many cases are sealed nationwide that the FBI has more than 20 people who do nothing but destroy records – records that otherwise might help police identify repeat offenders.

'Legalese of the highest order'

One reason so many people get sealings in Florida is that even people who admit they're guilty can get a case sealed. Judges can "withhold adjudication," meaning they don't formally convict the defendant.

Like the goal behind the sealing law, the original purpose of "withholding" was to give youthful offenders a break. But it has become so common "that the exception

has swallowed the rule," says Hank Lavandera, a Hillsborough prosecutor. "Now it can be just about any charge at any age under any circumstance."

Anyone who gets a withhold is a potential candidate for a sealing.

When the sealing statute was enacted,"withholding adjudication really wasn't around," says Vose, the Orange County prosecutor. "The way it works now you can plead guilty and get a withhold. You're admitting you're a thief and you still get it sealed."

Indeed, where the outcome is known, more than 40 percent of those with sealed cases received a withhold of adjudication, the *Times* analysis shows.

Another reason for so many sealings is that the statute is written in what Miami attorney Neal Sonnett calls "legalese of the highest order." Many judges and prosecutors admit they don't fully understand it. That lets people skate through loopholes.

"I have lawyers call asking me for interpretation, and if lawyers are not sure what it means, obviously it's not totally clear," says Sonnett, past president of the National Association of Criminal Defense Lawyers. He thinks the law should be rewritten, both to curb abuses and make it easier for poor people to seal their own cases.

As it now stands, most defendants hire a lawyer to seal their cases – and generally those who can afford lawyers are middle-class whites. Almost 25 percent of the people arrested in Florida are black, but they get only 13 percent of the sealings, the *Times* found.

Despite its flaws, Sonnett argues, the statute helps many deserving people and should be kept.

Others aren't so sure. They worry about the confusion over the law that nearly let James E. Regan keep his past hidden.

In 1981 police said, he was among several men who used Funland Amusement Park to lure boys into having sex. "Banker Jim," as he was known to the youths, acknowledged to police he had taken one boy to his apartment. But he said he had stopped having sex with minors.

"I can see what's happening to people and I think it's about time I got my s--- together," he told police.

Regan paid the boy $10,000 to settle a civil suit. In criminal court, he pleaded no contest to lewd and lascivious act on a minor, got a withhold and probation. Then he got the case sealed. He wouldn't comment for this story.

Years later, when Pinellas prosecutor Mooney found out about the Tampa case by luck, he thought sealed records were off limits to him.

Only after a reporter asked him about the case last week did he go back and check the law books. He discovered that if he can prove his case, he can use Regan's 1981 arrest to press for a harsher sentence.

"Everyone believes that you can't use it – it's expunged, it's gone," Mooney said. "Now I know better."

Getting help from both sides of the bench

• A man with a string of arrests got favorable rulings from a judge who had been his attorney, and another judge who had been in private practice with that attorney.

By SUSAN TAYLOR MARTIN and BOB PORT Times Staff Writers

Jeffrey Roy Mira has been arrested at least 20 times on charges that range from grand theft to forgery to drug dealing.

But Mira's record would look even worse if it weren't for rulings by two Hillsborough circuit judges – Robert A. Bonanno and F. Dennis Alvarez. Before they became judges, they were in private practice together.

Bonanno, while still a defense attorney, represented Mira, but that didn't stop him from handling two of Mira's cases after he went on the bench. Both times, Bonanno found his former client not guilty.

And in 1983, Alvarez erased two of Mira's cases altogether – including one for armed robbery.

Nor was that the only time the former law partners ruled in favor of an ex-client after they became judges. As a defense lawyer, Alvarez represented a woman on a charge of carrying a concealed weapon. As a judge,

Alvarez sealed her records. On the same day, Bonanno sealed her indecent exposure charge.

Alvarez says it might have been wiser not to hear cases involving former clients. But he says he told prosecutors and they didn't object.

Bonanno says he told prosecutors he once represented Mira, but the state had no objections. "I didn't have any problem" hearing his case as a judge if the state didn't, he says. Beyond that, Bonanno said it would be improper to comment on sealed cases.

Mira's good fortune

Hillsborough sheriff's deputy G.T. Veitch investigated Jeffrey Mira several years ago. She didn't know he had two of his cases sealed. But she remembers him.

"He's a manipulator," says Veitch. "He knew how to use the system."

Mira was 18 when he was arrested in 1978 for possession of marijuana and carrying a concealed firearm. He got two years probation.

Before that case was resolved, he was arrested for burglary. He pleaded guilty in 1979, but a judge didn't formally convict him. In 1980, barely off probation, he was charged with burglary again.

In 1981, Mira admitted driving the getaway car when an acquaintance robbed an elderly man of $700. Represented by *Attorney* Bonanno, Mira pleaded guilty to armed robbery. Again, adjudication was withheld and Mira avoided jail.

On Aug. 2, 1983, Judge Alvarez sealed the 1980 burglary and the 1981 armed robbery case – despite Mira's growing record and the fact the two cases appeared unrelated. The statute permits only one sealing in a lifetime.

Florida law "in my opinion allows for one expungement under these circumstances," Tampa police Maj. J.G. Godwin wrote Alvarez in 1984 in a letter of objection. "This department certainly has no intention of not complying with your court order but is making you aware that these two case(s) appear to relate to two separate arrests."

The cases remain sealed.

Alvarez says he doesn't remember Mira's cases or any letter from police. If he got a letter, he says, he would have sent it to prosecutors to investigate.

Sealing two cases of one defendant was routine back then, Alvarez says. "It was a very gray area (of the law) as to whether or not you could do dual expungements."

In 1984 Mira was arrested twice on disorderly conduct charges – once for swearing at a convenience store clerk when asked for an ID, the other after deputies said he swung at them when they responded to a complaint he had been beating his mother. In separate non-jury trials, *Judge* Bonanno cleared his former client of the charges.

In 1989, another judge sentenced him to 2½ years in prison on cocaine and grand theft charges. He was out in eight months.

Several arrests followed, and his mother asked for a protective order because, she said, he had waived a knife in front of her face and threatened to kill her.

Mira, in a letter to the *Times*, blamed some of his problems on "a bout with cocaine."

In January he was sent back to prison for 3½ years for violating his probation in a 1990 case.

"He did an awful lot," Deputy Veitch says of Mira's criminal past.

"But he got away with an awful lot."

Sunday April 16, 1989
The Miami Herald

A charity reaps cash and trouble

By JUSTIN GILLIS *Herald Staff Writer*

"Missing!"

The bold black letters shout from beneath photographs of little girls. The posters put out by the Bureau of Missing Children declare: "These children could be yours."

Across Florida, the bureau's phone solicitors call citizens at random and plead for money to "put an end to this tragic problem." Thousands of contributors have responded with more than $1.5 million over the years, $15 or $20 at a time.

Contributors were not told that, as their money came in, convicted felons and crack cocaine addicts hired by the bureau were walking out with tens of thousands of those dollars.

Or that the man who controls the books, bureau founder John Lewis Russell III, has distributed a phony resume, used phony Social Security numbers and been charged with crimes at least four times, including a count of possessing cocaine. He has never been convicted.

Russell says he has used the public's money to find more than 300 missing children in five years, but he refuses to document that claim, saying he wants to protect families' privacy.

This is what The Miami Herald [learned about] the Bureau of Missing Children, based in Tampa with offices across the state:

• Though Russell is a private detective and claims to check applicant backgrounds, his organization has repeatedly hired employees with questionable histories, including convicted felons who later stole money from the charity. Internal bureau estimates show more than $70,000 missing from the Miami office alone.

• Despite its early promises, the Bureau of Missing Children has seldom handled criminal child abductions. The kids the bureau found – and state officials have documented fewer than 20 such cases in five years – were abducted by a parent who's lost custody in a divorce. Most money has gone to salaries and overhead.

• Russell put two people, later identified in sworn testimony by co-workers as crack cocaine addicts, in charge of the bureau's Miami office. They told a friend they could take as much as $1,000 a week, and they were later accused of burglarizing the bureau.

"I didn't advertise for idiots, thieves and coke heads," Russell said, "but I got a few."

This is a glimpse at the inner workings of one lucrative charity. Some critics say the case illustrates more. The Bureau of Missing Children boasts in its phone pitches that it is licensed by the state. Many other Florida charities made the same statement, implying careful regulation by the government.

In truth, Florida officials do not closely monitor the organizations they license. Across the state, opportunities for deceit and thievery abound.

Sprang up amid hysteria

The Bureau of Missing Children was conceived in 1983, amid national alarm over child abductions. The case of Adam Walsh, a Hollywood boy who was kidnapped and decapitated, galvanized parents. Missing children's groups sprang up across the country.

Many were well-intentioned, but others exploited the hysteria, putting out wild estimates of the number of missing children – as high as two million a year.

In truth, most "missing" children have run away from home or been abducted by the parent who lost a custody battle. The FBI lists fewer than 100 open cases of children kidnapped by strangers.

Russell, then head of the Florida Association of Private Investigators, said he wanted to apply detectives' skills to the plight of children abducted by strangers.

Many detectives volunteered. The Bureau of Missing Children was officially formed on Nov. 9, 1983. But Russell quickly discovered a flaw in his plan: As law enforcement officials had been warning, there simply weren't that many criminal abductions to investigate.

Russell, in a television interview, once described his "chagrin" and "surprise" at this discovery. He has said he agrees with law enforcement that missing-children figures are often inflated. But it didn't stop him. He decided to focus on parental abduction cases.

Russell printed stationery featuring a drawing of a desolate little girl. He touted endorsements from public officials. Many of them, like former legislator and current

County Commissioner Larry Hawkins, later repudiated the group.

Russell said recently he was shocked at how rapidly the bureau took off. His organization opened phone rooms in seven cities across Florida.

In its first full year, the bureau raised more than $400,000.

Russell: "I know I bit off more than I could chew."

From its earliest days, the Bureau of Missing Children was plagued by trouble.

The Metro-Dade Police Department busted Gerald Paul Cyr, an employee in the Miami office, for drunk driving in December 1984. He had a long arrest record: aggravated assault on a cop, resisting arrest, trespassing. Wondering how somebody with such a record could work at a legitimate charity, the cops recommended a fraud investigation. Nothing came of it.

Former employees of the bureau began talking to police across the state with tales of deception and larceny. The investigations culminated in 1985, when the Florida secretary of state's office – which regulates charities – called the organization a "serious threat" to the public and tried to strip Russell's charity license.

The state leveled a series of charges, claiming Russell's organization had lied to potential contributors, misrepresented how funds were used, misspent public donations to investigate rival charities, and committed other sins. The state said the bureau has raised more than $300,000 using a professional fund-raising firm headed by a man serving 10 years' probation for grand theft.

Florida's penalties for charity violations are weak. Despite the long list of charges, the secretary of state dropped some charges and settled others in 1987 for a $135 fine.

While Florida licenses charities like Russell's, the organizations are required to do little more than submit annual paperwork to Tallahassee.

"Not only is regulation in Florida poor, it's virtually nonexistent," said Shelley Bradshaw, former head of the Florida Division of Licensing in Tallahassee, which regulates charities. "As soon as you put 'registration' in front of the public, they think they're safe. Just because a charity is registered is not the key to the kingdom."

State officials, frustrated by weaknesses in the charity laws and their longstanding inability to crack down on bad charities, are seeking changes this year from the Florida Legislature. Pending bills would stiffen penalties and transfer enforcement of the rules to state criminal investigators.

Russell blames the state investigations of his charity – and a long series of unfavorable press reports – on the grumbling of former employees. He notes that some of those employees bear a grudge because he accused them of theft after they left. One admitted stealing $4,800.

"When people steal from me, I want to put them in jail," Russell said. "That's one of my problems, my vindictiveness. I went to my church and talked to my priest about that."

Some cases solved

It is clear that Russell's use of private investigators solved a few missing child cases, all parental abductions. At least a half-dozen parents have publicly thanked the organization.

But some former bureau employees say there were only a few such cases, and they were mostly window dressing. The state and independent investigators have documented fewer than 20 cases of children found by the bureau since 1983, though Russell insists there are more than 300.

The state took 15 names of missing children from Russell's files in 1985. In nine cases, parents credited bureau detectives with finding their children. In two cases, the bureau's role couldn't be confirmed. In four cases, parents or police said the bureau played no role.

Even less clear is where all the money has gone.

Bureau detectives have generally received neither salary nor expenses. The most recent financial statement shows detectives got only $17,782 in payments from the 1987 budget of $378,466. Russell refused to provide documentation that those payments were actually made, and he refused to provide names of detectives who got the money.

Russell's organization, like all large charities, is required to hire auditors and submit a financial report to the state. But the bureau's auditors have warned that their work cannot always protect against fraud, particularly by nonprofit organizations.

The reason: Contributions stolen as they came in would never be reflected in an audit. Internal documents say that bureau employees have stolen tens of thousands in bureau funds that way, mostly in cash.

With the tight lid Russell keeps on financial information, Florida citizens who are thinking of contributing have little more to go on than Russell's credibility and his record as a manager.

Russell: "I am patently honest. There has never been any playing with the books."

Russell's personal history includes a series of criminal charges that never went to trial.

He was accused in 1978 of operating his detective agency without a license. The state attorney dropped charges. On Aug. 31, 1981, he was charged with grand theft after witnesses alleged that he collected insurance premiums from private detectives, sent them phony insurance certificates and kept the money. Those charges were dropped when Russell's wife took the blame. The couple soon divorced.

Russell was arrested on March 14, 1984 driving a $25,000 DeLorean automobile and charged with possession of cocaine and cocaine paraphernalia. Russell said he borrowed the car, and the cocaine wasn't his. That case was dropped, too.

Russell has used at least two phony Social Security numbers on sworn documents, including one filed with the state driver license bureau. He said he didn't mean to deceive, and has promised to correct the license.

Russell once gave state agencies a resume claiming, falsely, that he had attended the University of Central Florida. He now acknowledges the resume is inaccurate and says he distributed it as a "joke."

Over the years, the credentials of some other bureau managers have been less than sterling. A series of Russell friends and associates held the figurehead title of bureau president, while Russell always served as corporate treasurer and controlled the books.

One company president, asked under oath how much the bureau raised the previous year, couldn't say. Another, Patricia Kane, left after two months and now cites differences with Russell over "ethics and morals." She won't specify. A third president, car reposesser John Weaver, was forced out because he ate a honeybaked ham donated for a kids' Christmas party.

Problems have not been restricted to the bureau's main office in Tampa. Ed Bullard once managed offices in Miami and Fort Lauderdale. Before Russell hired him, Bullard had spent two years in state prison on charges of grand larceny, carrying a concealed weapon and writing bad checks. He was ultimately forced out of the bureau after he admitted stealing $4,800. He pleaded guilty in court.

For more than a year, the Miami manager was Kimberly Biddle, a former go-go dancer and crack-cocaine addict with a criminal record, including robbery.

Biddle: "My interview when I applied at the bureau was all of, 'Can you talk? Can you dial a phone? You're hired.' Three days later. I was managing the office."

She is now highly critical of the bureau. She supplied copies of documents she saved when she worked there. Though not conclusive, they suggest the possibility that the Miami office sent more money to Russell's office in Tampa than was deposited in the bureau's official bank account.

Russell sharply dismissed that accusation, saying Biddle stole money while she ran the Miami office. She denied it.

Russell has given conflicting accounts of how much he gets in salary from the bureau. Under oath last year, he said $2,000 a week. That would add up to $104,000 more than a quarter of the bureau's annual income.

No longer under oath, Russell says he makes an average of $500 a week. He calls the higher figure a court reporter's mistake, something court reporter Sarah Sprowl denies.

A strange episode

Perhaps the bureau's most bizarre episode is told in records of a criminal case last year.

Tracy Houghton and Joe Goodart, red-hot fund-raisers, went to work for Russell in 1987. At one time they ran three fund-raising offices, including Miami.

Sworn testimony by co-workers has indicated the pair smoked crack cocaine every day, sometimes leaving work in the middle of the day and later returning under the influence of the drug.

Bureau managers began to suspect Houghton and Goodart of stealing money. They claimed the bureau owed *them* money.

An argument broke out in Tampa. Houghton and Goodart resigned. They borrowed a car with no tag on it, plugged in a radar detector and barreled down U.S. 27 to Miami. The police arrested them on burglary charges late that night as they rifled papers in the deserted Miami office.

Houghton and Goodart said they just wanted to reclaim personal belongings. A friend of theirs, Bob Gaurkee, testified that they told him why they had to get to Miami so quickly: "They just said that they had to make some changes in the books and get a hold of them before anybody else got them."

Assistant Public Defender Steve Leifman got the case thrown out on the theory that managers of a business could hardly burglarize their own office.

Russell said the incident bothered him. He predicted that problems in regulating charities will prompt the state to turn the task over to criminal investigators. But in conversations with The Herald, he took little responsibility for the troubles that have plagued his own charity.

"There is a lot of theft and dishonesty within the whole industry," he said. "It breaks my heart. You just don't know what a nightmare it is, wondering who's stealing from you today."

IN THE SECOND DISTRICT COURT OF APPEAL
LAKELAND, FLORIDA

STATE OF FLORIDA

Appellee,

vs.

Appeal No.
89-1468

JOHN LEWIS RUSSELL, III,

Appellant.
_____/

APPEAL FROM THE CIRCUIT COURT OF THE
THIRTEENTH JUDICIAL CIRCUIT OF THE
STATE OF FLORIDA, IN AND FOR
HILLSBOROUGH COUNTY, FLORIDA[ ]
CRIMINAL DIVISION

APPELLANT'S INITIAL BRIEF

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110 South Armenia Avenue
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Attorney for Appellant[ ]

* * *

STATEMENT OF THE CASE

The issues in this appeal revolve around the propriety of three separate expungement orders entered by the Circuit Court of the 13th Judicial Circuit, in and for Hillsborough County, Florida.

On May 31, 1979, the defendant/appellant, JOHN LEWIS RUSSELL, III, (hereinafter referred to as RUSSELL), was arrested for the felony offense of carrying a concealed firearm. That case was assigned the Circuit Court case number of 79-4348 A. Instead of filing a felony charge against him, the State Attorney's Office decided to file a misdemeanor information based upon the arrest, charging RUSSELL with carrying a concealed weapon, that information was filed in County Court, criminal division, case number 79-7292 B. RUSSELL plead nolo contendere to that charge, the Court withheld adjudication and placed RUSSELL on thirty days unsupervised probation. After having successfully completed the unsupervised probation, pursuant to Section 901.33 Fla. Stat. (1979), in February, 1980, RUSSELL filed a Motion to Expunge asking the County Court to enter an order expunging all official records relating to his arrest and all matters filed with the Clerk, including docket entries. That motion was granted by County Judge Perry Little on June 13, 1980. Because the order in misdemeanor case number 79-7292 B pertained only to the misdemeanor criminal history records, could not and did not expunge the felony arrest or case number records, in September of 1980 RUSSELL filed a similar motion to expunge in Circuit Court, case number 79-4348 A (i.e. the case number originally assigned to Circuit Court because the arrest was for a felony) seeking an expungement of the criminal history records pertaining to the felony arrest. On October 3, 1980 (two days after Section 943.058 Fla. Stat. (Supp. 1979) became effective repealing and replacing Section 901.33 Fla. Stat. (1979) Judge Harry Lee Coe

entered an order expunging RUSSELL's felony criminal history records in case number 79-4348 A.

On August 31, 1981 the Hillsborough County State Attorney's Office filed a direct information charging RUSSELL with Grand Theft, case number 81-8465 E. A warrant for RUSSELL's arrest was issued and on September 11, 1981 RUSSELL was arrested on that warrant. On March 19, 1982 Judge Rogers Padgett dismissed the case against RUSSELL on a C-4 motion filed by RUSSELL's attorney. On June 17, 1982 pursuant to Section 943.058 Fla. Stat. (1981) RUSSELL filed a Motion to Expunge, asking the trial court to expunge all official records relating to the arrest, and all matters filed with the clerk, including docket entries. (R. 5 and 6). In that motion, RUSSELL specifically acknowledged that he had prior records expungements, but asked the trial court to invoke paragraph (3) of Section 943.058 Fla. Stat. (1981), which arguably, would allow the Court to enter more than one expungement if the court found "unusual circumstances requiring the exercise of the extraordinary equitable powers of the court." To this Motion to Expunge, the State files no traverse or demurrer nor does it otherwise object to the motion being granted.

Right here is where the facts of the case become a little confusing. The undersigned attorney represented RUSSELL in 1981 in case number 81-8465 E both for the case in chief and for expungement purposes. Although after seven years the undersigned, quite frankly, cannot exactly remember every detail, on or about July 6, 1982 Judge Padgett enters an "Order" granting RUSSELL's motion to expunge. A conformed copy of this order is attached to the motion to clarify the record which was

filed and heard in the trial court, and is made a part of the appellant's second motion to extend time filed with this appellate court on August 30, 1989. (R. 66). In any event, the clerk of the trial court apparently misplaced the original court order dated July 6, 1982 and it is not now a part of the official court record. In fact there is no record of its existence at all except for the undersigned's recollection and the conformed copy in the undersigned's file. In September of 1983, RUSSELL discovered that F.D.L.E. still had a public record of his criminal history in case number 81-8465 E. RUSSELL contacted the undersigned who, on November 29, 1983 went before Judge Padgett again on the motion to expunge filed back in June of 1982. On November 29, 1983 Judge Padgett enters an order entitled "Order Directing Sealing of Record" which states that "the motion to expunge is granted" and "all official records . . . are hereby expunged". (R. 7)

After the undersigned filed his Notice of Appeal in this case, it became apparent that the clerk could not make the missing order of July 6, 1982 a part of the official record for appellate purposes pursuant to either the Written Directions to the Clerk (filed May 25, 1989) or the Amended Written Directions to the Clerk (filed later). Because the November 29, 1983 order was entitled "Order Directing Sealing of Record" but the body of the order spoke in terms of expungement, the undersigned filed a motion to clarify the record (R. 60-66) which was heard by the trial court on September 1, 1989. Based upon that hearing, the trial court entered an "Order Clarifying Record", which interpreted the November 29, 1983 order to grant the relief of an expungement, rather than a sealing. (R. 77 and 78). A similar ambiguity was resolved

by the order clarifying the records in case number 84-3173 A. The undersigned felt the clarification was important because, as discussed later in the argument portion of this brief, RUSSELL was clearly not entitled to a sealing under Section 943.058, but was arguably entitled to an expungement at the discretion of the trial court.

Lastly, and less confusingly, is the motion to expunge and order entered thereon in case number 84-3173 A. On March 14, 1984, RUSSELL was arrested for possession of cocaine (felony) and possession of drug paraphenalia (felony). These offenses were assigned the Circuit Court case number 84-3173 A. The State Attorney filed no criminal information thereon and on May 23, 1984 issued a Letter of Release, evidencing the State's intention not to prosecute RUSSELL on this offense. On November 19, 1984, RUSSELL's attorney, Joseph Spicola, filed a motion to expunge (R. 10 and 11). That motion also disclosed the existence of previous expungements. The State filed no traverse or demurrer nor did it otherwise object to the Court granting the-motion. On December 4, 1984, Judge Harry Lee Coe entered an order entitled "Order Expunging and Sealing Criminal Records". (R. 14-16). As in the preceeding case, although the order mentions sealing in the heading, it finds that the defendant is entitled to an expunction and grants the defendant's motion to expunge. Again, in order to clear up what may be viewed as an ambiguity, on September 1, 1989 the trial court entered an order clarifying the record, finding that the defendant had sought an expungement, and the court granted him one. (R. 77 and 78).

The record also reveals that both law enforcement (Tampa Police Department) and the State Attorney's

office brought the question of the propriety of the 84-3173 A expungement to the Court's attention after the order was entered, and before the Miami Herald's successful intervention. On January 16, 1985, Tampa Police Department's Major Seal wrote a letter which told Judge Coe that the most recent expungement order "may not satisfy Florida law because of the November 29, 1983 order entered by Judge Padgett." (R. 17). That is, it was Major Seal's interpretation of Section 943.058 Fla. Stat. (1983) that a defendant may only be granted one expungement. However, on May 23, 1985, Major Campbell, also of Tampa Police Department wrote Judge Coe a letter asking the court to "please disregard . . . " Seal's letter, as it was the opinion of the City of Tampa's legal department that because a criminal information was not filed against the defendant, the statute allowed this expungement. (R. 18, 19).

The matter was not dead yet. On January 21, 1986, the State Attorney's Office filed a Motion for Rehearing alleging that the defendant was not entitled to an expungement on the latest case because he had two previous expungements. (R. 20). Attorney Spicola filed a responsive pleading addressing the timeliness and jurisdictional issues of the State's challenge, (R. 21) and on January 31, 1986, Judge Coe entered an order denying the relief requested by the State Attorney's Office, and granting the defendant's motion to strike and/or dismiss the State's motion for rehearing.

* * *

CONCLUSION

Based on the foregoing facts, arguments and citations of authority, it is respectfully submitted that the lower court erred. Appellant requests that this court reverse this cause for proceeding to re-establish the expungements previously granted.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing initial brief has been furnished by U.S. Mail to George K. Rahdert, Esquire, Rahdert & Anderson, 223 Third Street North, St. Petersburg, Florida 33701, Lee W. Atkinson, Esquire, State Attorney's Office, 5th Floor, Courthouse Annex, Tampa, Florida 33601, and to Attorney General's Office, Dept. of Legal Affairs, 1313 Tampa Street, Room 804, Tampa, Florida 33602, this 19th day of September, 1989.

/s/ Richard S. Blunt
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Attorney for Appellant

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA, IN AND FOR HILLSBOROUGH COUNTY

CRIMINAL JUSTICE DIVISION

THE STATE OF FLORIDA	:	Case Nos.
	:	79-4348
vs.	:	81-8465
JOHN LEWIS RUSSELL	:	84-3173
	:	Division "A"
	:	

This cause came on to be heard before the Honorable Harry Lee Coe, III, Circuit Judge, at the Hillsborough County Courthouse Annex, Tampa, Florida, on Thursday, April 20, 1989, as follows:

APPEARANCES:

Hon. Ronald N. Ficarrotta, Assistant State Attorney, in behalf of the State;

Richard S. Blunt, Esquire, 110 South Armenia, Tampa, Florida 33609, in behalf of the defendant;

George K. Rahdert, Esquire, 233 Third Street North, St. Petersburg, Florida 33701, in behalf of the *Miami Herald*

* * *

THE COURT: Is there any procedure for me to do this?

MR. BLUNT: Yes, sir, We are ready.

THE COURT: No. Is there a procedure in the statute for me to, once I have sealed it, to unseal it?

MR. BLUNT: There is not.

MR. RAHDERT: Your Honor, there is case law on that, and there is a procedure established by the Florida Supreme Court for this type of proceeding. I can address that with case law.

THE COURT: Go ahead.

MR. RAHDERT: Your Honor, let me hand up –

THE COURT: Excuse me for interrupting. Was this a sealment and an expungement?

MR. RAHDERT: Your Honor, the situation is that we have three cases.

THE COURT: Are they all different?

MR. RAHDERT: Two were expunged and one was sealed.

THE COURT: So, what are the two that are expunged?

THE CLERK: The 79 and the 84.

THE COURT: And the other was sealed?

THE CLERK: Yes, sir.

THE COURT: And not both, just an expungement, a sealing and an expungement.

MR. RAHDERT: That's right, Your Honor.

THE COURT: Was that done properly? Now, we can only, what, seal?

MR. FICARROTTA: Now you can seal them, Judge, and then they have to wait ten years before they are expunged.

THE COURT: But back then you could do –

MR. RAHDERT: That is the same law as back then, just a different interpretation of it. That really is the issue that we want to address on the merits.

THE COURT: Has the law changed?

MR. RAHDERT: No, Your Honor. the only change in the law was in 1988 in which the law made clear that the Court has sole discretion, in the language of the legislature, to deny request for expunction or sealing.

THE COURT: Well, –

MR. RAHDERT: As to the ten-year requirement –

THE COURT: Well, excuse me. Excuse me. What is the date that I did this, Wanda?

* * *

THE COURT: Is that the Information here? Were Informations or Indictments filed here?

MR. RAHDERT: It's hard for us to say as the *Miami Herald* because we confront a closed file.

THE COURT: I see. Can anybody answer that?

MR. BLUNT: Judge, let me try to recall the best I can what happened. We are talking about the first case here, I think, the 1979 case, I believe the case number was.

I think what happened here, Your Honor, is Mr. Russell was arrested at a 7-Eleven, I think, for carrying a concealed firearm. He was at that time, I believe, a licensed private investigator which basically excluded him from possible felony charges on that particular kind of an arrest.

He was arrested on the felony, but I think he was ultimately charged with a misdemeanor, and I don't know whether that was an Indictment or an Information or just a Notice to Appear. I don't remember.

In any event, Your Honor –

THE COURT: Well, I guess we got to find out. Do you have the files there, Wanda?

THE CLERK: No, sir. They are sealed and expunged.

THE COURT: Well, they must be somewhere. They don't just disappear when we seal and expunge them.

THE CLERK: They go to microfiche, and I don't know where they are. Even on microfiche, it says that it's sealed or expunged, so I have no idea where the records would be.

THE COURT: Well, assume I grant whatever is asked for here. Will we be able to find out?

THE CLERK: Well, I need to know. I need those files if they are available.

MR. RAHDERT: Your Honor, under the statute –

THE COURT: Well, excuse me. Just one second. So, that was one case. Do you remember the other two by any chance? Well, is Mr. Russell here?

MR. BLUNT: No, Judge, he is not.

THE COURT: You do represent him?

MR. BLUNT: I represent John Lewis Russell, III, Your Honor, and for purposes of this motion, we are not admitting that my client is the same person that they are talking about here. Okay.

Let me just interject this quickly. I think the first thing we ought to do, I think the first motion that is filed here is a Motion to Consolidate.

One or two of these sealing or expungements were actually handled by this Court; a couple of others weren't.

The threshold issue is whether or not this Court wants to wrap up all three of these cases.

THE COURT: Well, I will hear them all.

MR. BLUNT: That is fine with the defense, Judge.

THE COURT: What are they about here, do you know?

MR. BLUNT: I know what this is about.

THE COURT: What is going on?

MR. BLUNT: Here is what is going on. John Lewis Russell is, basically, the organizer and chief officer

of a charity in Florida here. It's called the Bureau of Missing Children. He has been operating under the law in a licensed fashion since 1983, I think.

His operation basically is a network of private investigators who donate their time. What he does is he administers. Basically, it's a fund-raising organization. Its main purpose is to find missing and lost children.

Over the years, he has raised not an insignificant amount of money, Your Honor. We are talking – the *Miami Herald* is alleging a million and a half dollars, and I can't dispute that over six years.

I think the majority of these funds were collected in phone room operations, basically cold call solicitors. We are talking about boiler rooms.

Okay. There is nothing against the law in that. One of the problems that Mr. Russell has had difficulty over the years finding employees to do this kind of work.

I think the record will show that the kind of employees he has had over the years were somewhat less than honorary citizens here. Some of them had prior criminal records. Some of them were caught stealing by my client and subsequently charged and arrested and hassled by the law enforcement agencies.

THE COURT: So, somebody is complaining that he is getting the money and it's not going in the right direction?

MR. BLUNT: That is exactly right, and there is an investigative reporter here, Your Honor, who has been doing a lot of research into this case and wanting interviews with this and that.

Truthfully, when the *Miami Herald* filed this information about a month and a half or two months ago, this was still in an investigative stage, and I figured they were filing this information to give them privilege to print Mr. Russell's previous criminal history.

Just to show you the arrogance of the Press, they have gone ahead and printed this stuff. Just in last Sunday's *Miami Herald*, Sunday Edition, they went ahead and printed this article that included matters that were covered by your previous orders, Your Honor.

That came as kind of a surprise to me. I thought they would at least have the courtesy to wait until this Court heard this motion and

* * *

MR. BLUNT: Judge, you and I have both been around long enough to know this stuff was done routinely. I don't think anybody knew or appreciated what the statute was intended to or really did, especially after the change in 1980.

Let me tell you the scenario as I recall it back then. As I said in the first case, the 79 case, Mr. Russell was arrested on a felony charge, pled no contest and a withhold on the misdemeanor.

I left the State Attorney's Office in January, 1980, and I represented John up front. What happened in this case, Your Honor, my recollection is because he was –

THE COURT: In the what case, the 79 case?

MR. BLUNT: The 79 case. there is a misdemeanor case here, to, Your Honor, that he ultimately pled to. That was the Number 1 motion to expunge. Okay.

THE COURT: Which probably – what would be your educated guess – do you think that was done by some kind of summons?

MR. BLUNT: I – I don't know, Judge.

* * *

John Lewis RUSSELL, III,
Appellant/Cross Appellee,

v.

MIAMI HERALD PUBLISHING CO.,
Appellee/Cross Appellant,

v.

STATE of Florida, Cross Appellee.

No. 89-01468.

District Court of Appeal of Florida,
Second District.

July 6, 1990.

The Circuit Court, Hillsborough County, Harry Lee Coe, III, J., allowed a newspaper to intervene in three cases which were separate criminal proceedings for the purpose (sic) having the expunction orders entered in those cases vacated, vacated the expunction orders in two of the cases, refused to hold a newspaper in contempt and denied a request to have the newspaper reveal its sources, and cross appeals were taken. The District Court of Appeal, Parker, A.C.J., held that: (1) trial court had jurisdiction to rehear and vacate expungement orders; (2) newspaper had standing in the proceeding; (3) no unusual circumstances were required for court to order expunction of court records; and (4) newspaper had burden of proving that vacation of expunction order would serve the public interest, that there was a "substantial probability" that, in absence of vacation of the closure order, the public interest would be harmed and that no less restrictive alternatives were available.

Affirmed in part; reversed in part; and remanded.

Altenbernd, J., filed a specially concurring opinion.

Richard S. Blunt, Tampa, for appellant/cross appellee.

George K. Rahdert and David S. Bralow of Rahdert & Anderson, St. Petersburg, for appellee/cross appellant.

Robert A. Butterworth, Atty. Gen., Tallahassee, and Anne Y. Swing, Asst. Atty. Gen., Tampa, for cross appellee.

PARKER, Acting Chief Judge.

John Lewis Russell, III, appeals a trial court order which allowed the Miami Herald Publishing Company to intervene in three cases which are separate criminal proceedings from 1979, 1981, and 1984 for the purpose of having the expunction orders entered in each of those cases vacated; vacated the expunction orders in two of the three cases; denied Russell's motion for order to show cause why the Herald should not be held in contempt; and denied Russell's request to have the Herald reveal its sources. The Herald cross appeals the same order, alleging the trial judge erred in not vacating the one expunction order and further erred in ruling that the standards designed to protect the constitutional and common law right to access is inapplicable to a court's consideration of a motion to vacate an expunction order. Russell also challenges the constitutionality of section 943.058, Florida Statutes (Supp.1980). We reverse.

The criminal records of Russell relevant to this appeal, all from Hillsborough County, are as follows:

Case No./Offense	Disposition	Expunction
79-7292B Misdeameanor charge[1]	Nolo plea; Withheld adjuciation	6/13/80 order expunging records
79-4348A Carrying concealed firearm/ felony	Never filed as felony	10/3/80 order expunging records
81-8465E Grand theft	Dismissed	7/6/82 order expunging records
84-3173A Possession of cocaine and drug paraphernalia	No information filed	12/4/84 order expunging records

In 1989, the Herald assigned an investigative reporter to do an article concerning a Florida nonprofit charitable organization, Bureau of Missing Children, Inc., of which Russell is the chief executive officer. Through the course of the reporter's investigation, the Herald learned that Russell had been arrested on several occasions and that Russell had the criminal history records expunged. The Herald learned from an unknown source the details of the cases, the case numbers, and the dates and nature of the orders expunging the records.

The Herald sought to intervene in these cases and to vacate expunction orders and unseal court records

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[1] Although we recognize that this file remains expunged and for that reason would hesitate to discuss it in this opinion, Russell's attorney fully discussed the exact charge and facts surrounding this charge during a hearing before the lower court. We find it necessary to discuss the charge in this opinion because of its interconnection with the other charges and issues.

involving all criminal cases against Russell except the 1979 misdemeanor charge. The Herald sought access to the judicial records only and not to law enforcement or other agency records. Russell challenged the Herald's standing to intervene and filed a motion for order to show cause why the Herald was not in contempt for obtaining and publishing criminal history information relating to Russell and further requested that the trial court order the Herald to disclose its source of information.

At a hearing on the merits, the judge ruled that the Miami Herald had standing to question the validity of the expunction orders. The judge then ruled that the trial court had discretion to seal or expunge its own judicial records. The judge further ruled that other criminal history records could be sealed or expunged as long as the requirements of section 943.058(2)(a)-(d), which will be set out below, are met. Finally, the judge ruled that the standards designed to protect the public's right to access was (sic) irrelevant to its determination of the motion to vacate the expunction orders.

Applying these rulings to the facts of these cases, the trial court ruled that the expunction ordered in the 1979 felony case, as to both the court's own judicial records and the other criminal history records, was properly entered and refused to vacate that order. Relative to the 1981 and 1984 cases, as to both the court's own judicial records and the other criminal history records, the trial judge ruled that the trial court had abused its discretion in entering the expunction orders and vacated those orders. The judge ruled that there had to be a showing of unusual circumstances in order for the trial judges to

have ordered the expunctions. He then found that no unusual circumstances existed at the time the expunction orders were entered.

Preliminarily, we hold that the trial court had jurisdiction to rehear and vacate the expungement orders, *see Johnson v. State*, 336 So.2d 93, 95 (Fla.1976); that the Herald does have standing in this proceeding, *see State ex rel. Miami Herald Publishing Company v. McIntosh*, 340 So.2d 904 (Fla.1976); and that the doctrine of res judicata does not bar the litigation of these issues because there is no identity of the parties. *See Miller v. Cowart*, 546 So.2d 768 (Fla. 2d DCA 1989).

The expunction orders at issue are governed by section 943.058, Florida Statutes (Supp.1980).[2] The statute provides:

> **943.058 Criminal history expunction or sealing.–**
>
> (2) The courts of this state shall continue to have jurisdiction over their own procedures, including the keeping, sealing, expunction, or correction of judicial records containing criminal history information. The courts may order the sealing or expunction of any other criminal history record provided:
>
> (a) The person who is the subject of the record has never previously been adjudicated guilty of a criminal offense or comparable ordinance violation;

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[2] This version of the statute became effective on October 1, 1980, and remained in effect until July 5, 1988.

(b) The person who is the subject of the record has not been adjudicated guilty of any of the charges stemming from the arrest or alleged criminal activity to which the records expunction petition pertains;

(c) The person who is the subject of the record has not secured a prior records expunction or sealing under this section, former s. 893.14, or former s. 901.33; and

(d) Such record has been sealed under this section, former s. 893.14, or former s. 901.33 for at least 10 years; except that, this condition shall not apply in any instance in which an indictment or information was not filed against the person who is the subject of the record.

(3) Notwithstanding subsection (2), criminal history records maintained by the Department of Law Enforcement may be ordered expunged only upon a specific finding by a circuit court of unusual circumstances requiring the exercise of the extraordinary equitable powers of the court. Upon a finding that the criteria set out in paragraphs (2)(a)-(c) have been met, the records maintained by the department may be ordered sealed by any court of competent jurisdiction; and thereafter such records and other records sealed pursuant to this section, former s. 893.14, former s. 901.33, or similar laws, shall be nonpublic records, available only to the subject, his attorney, or to criminal justice agencies for their respective criminal justice purposes. An order sealing criminal history records pursuant to this subsection shall not be construed to require that the records be surrendered to the court, and such records shall continue to be maintained by the department.

§ 943.058, Fla.Stat. (Supp.1980).

Our first inquiry is the interpretation of section 943.058. The Herald argues that a petitioner must meet the requirements of subsection (2)(a)-(d) in order to have the court's own records sealed or expunged. We disagree with this interpretation. Subsection (2) of the statute differentiates between the court's own records and other criminal history records. The requirements set forth in subsection (2)(a)-(d) apply only to the sealing or expunction of other criminal history records. We, therefore, interpret the statute as allowing a court to seal or expunge its own records, using its sound discretion. This court has recognized that a court has discretion to seal its own records even though a defendant had been adjudged guilty of those offenses. *See State v. Urf,* 524 So.2d 1118 (Fla. 2d DCA 1988). We recognize that our interpretation of the statute in *Urf,* which we reaffirm today, conflicts with the fourth district's opinion in *State v. Herstik,* 475 So.2d 1268 (Fla. 4th DCA 1985).

The next inquiry is the appropriate standard that a court should apply when considering a motion to vacate an order sealing or expunging the court's own records. This is where we believe the judge in this case erred. He ruled that there had to be unusual circumstances for the court to seal the records and that unusual circumstances did not exist in this case. The requirement of unusual circumstances, however, is found in subsection (3). That subsection provides that there must be unusual circumstances, in addition to compliance with the requirements in subsection (2)(a)-(d), for a court to order the expunction of criminal history records maintained by the Department of Law Enforcement. It is wholly inapplicable to the expunction of court records.

We have found no case in Florida which discusses what the relevant inquiry is for a court determining whether a prior expunction order should be vacated. First, we recognize that the press has a general right to access of judicial records. *See Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 98 S.Ct. 1306, 55 L.Ed.2d 570 (1978); *Globe Newspaper Co. v. Pokaski*, 868 F.2d 497 (1st Cir.1989). We determine today that in order for section 943.058 to be constitutional, the court must apply the three-pronged test which the United States Supreme Court enunciated in *Press-Enterprise Company v. Superior Court of California, County of Riverside*, 478 U.S. 1, 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986) when considering a request for closure of court records. The supreme court ruled that when a right of access attaches to a proceeding, closure can be ordered if (1) closure serves a compelling interest; (2) there is a "substantial probability" that, in the absence of closure, that compelling interest would be harmed; and (3) there are not alternatives to closure that would adequately protect that compelling interest. 106 S.Ct. at 2743. Similarly, the Florida Supreme Court has held that for closure to be permissible, the proponent must meet the following three-part test: (1) closure is necessary to prevent a serious and imminent threat to the administration of justice; (2) no less restrictive alternatives are available; and (3) closure would be effective in protecting the rights of the accused, without being broader than necessary to accomplish this purpose. *Bundy v. State*, 455 So.2d 330 (Fla.1984).

This case, however, is somewhat unique in that Russell's records have been sealed for several years. We believe that the sealings in these cases must be afforded a

presumption of correctness. *Cf. Tallahassee Democrat, Inc. v. Willis*, 370 So.2d 867 (Fla. 1st DCA 1979) (press does not have a first amendment right to require the opening of a court record properly sealed). The Herald, therefore, as the movant, must have the burden of proof in these proceedings. To accomplish this purpose, we modify the *Press-Enterprise* test for these proceedings as follows: (1) vacation of the expunction order would serve the public interest; (2) there is a "substantial probability" that, in the absence of vacation of the closure order, the public interest would be harmed; and (3) no less restrictive alternatives are available.

We reverse the judge's order which vacated the expunction orders relating to other criminal history records. The Herald never requested access to those records, and the original expunction orders, as they relate to other criminal history records, should stand.

Having reached these decisions, we certify to the supreme court the following two questions of great public importance:

I. CAN A TRIAL COURT SEAL OR EXPUNGE ITS OWN COURT RECORDS WHERE THE DEFENDANT SEEKING THIS RELIEF CANNOT COMPLY WITH SECTION 943.058(2)(a)-(d)?

II. WHAT IS THE APPROPRIATE INQUIRY FOR A COURT WHEN CONSIDERING A MOTION TO VACATE AN ORDER SEALING OR EXPUNGING COURT RECORDS?

We affirm the judge's ruling that the Herald should not be held in contempt for publishing truthful information which it lawfully received. *See The Florida Star v. B.J.F.*, 491 U.S. 524, 109 S.Ct. 2603, 105 L.Ed.2d 443 (1989). We also affirm his ruling of not requiring the Herald to reveal its sources. *See Morgan v. State*, 337 So.2d 951 (Fla.1976). We have considered all arguments raised on appeal and cross appeal. The issues not specifically addressed in this opinion are deemed to be without merit.

We reverse the court's order insofar as it vacated the expunction orders relating to case numbers 81-8465E and 84-3173A. We remand to the trial court for a new hearing as to the current appropriateness of the expunction of court records in all three contested cases, i.e., case numbers 79-4348A, 81-8465E, and 84-3173A. At such hearing, the Herald shall have the burden of proof and shall present evidence relevant to the modified *Press-Enterprise* test that we have set forth in this opinion. We also reverse the order insofar as it vacated the expunction orders as they relate to other criminal history records. We affirm the order in all other respects.

Affirmed in part; reversed in part; and remanded.

PATTERSON, J., concurs.

ALTENBERND, J., concurs specially.

ALTENBERND, Judge, concurring.

I concur with Judge Parker's decision in this difficult case. Because we have certified two questions to the supreme court, I merely comment on three troubling aspects of this problem.

First, we are holding that this procedure must be provided to the Miami Herald for section 943.058(2), Florida Statutes (Supp. 1980), and our own judicial rules to satisfy the first amendment. Even if this procedure is not constitutionally essential, it has merit as a matter of common law.

Second, we are requiring the Miami Herald to prove that vacation of the expunction order would serve the public interest. I confess some confusion as to the proof necessary to establish the requisite "public interest." If the trial court lacked jurisdiction or authority to enter the order or if the order was obtained upon fraudulent evidence, I can accept the proposition that a vacation of the expunction order would serve the public interest. I am very concerned that this process could be abused in cases in which the "public interest" is established by evidence of events after the conclusion of the criminal proceeding. This seems similar to granting the newspaper relief from the earlier order on the ground that it is "no longer equitable" to enforce the order. *Cf.* Fla.R.Civ.P. 1.540(b)(5).

Expunction is intended to give a person a fresh start or a second chance. In cases in which the person has been falsely arrested or wrongfully charged, it acts to minimize the harm caused by incorrect government activity. Undoubtedly, there are many fine citizens who have been given a break by understanding trial judges at some point in their lives. I do not believe the first amendment or the policies strongly supporting access to court records compel courts to reveal unproven accusations of drunkenness, petit theft, or other minor crimes, which occurred ten or more years ago, merely because a citizen has become a person of public interest. Although I do not

question the motives or integrity of the Miami Herald in this specific case, I do not believe that, as a general rule, a public figure should be haled into court under the modified *Press-Enterprise* standards for a public rehearing of the expunction of some youthful transgression – merely because inquiring minds wish to know.

On the other hand, if it is established that the beneficiary of an expunction order did not profit from the act of judicial grace and has been subsequently convicted of other crimes, arguably it is no longer equitable to conceal history. The orders which expunged Mr. Russell's judicial history gave him a limited right to legally deny history. § 943.058(6), Fla.Stat. (1987). Even though expunction, as a method to artificially erase history, is a concept that conflicts with our democratic principles of free speech and access to government records, I believe the courts should be very circumspect at hearings designed to eliminate rights that were earlier extended by the courts.

Third, although a criminal court may always retain subject matter jurisdiction over its sealed records, the same is not true for personal jurisdiction over the recipients of expunction orders. In this case, Mr. Russell voluntarily appeared and did not challenge the court's personal jurisdiction. I question whether the trial court could have entered an order modifying Mr. Russell's right to expunction if Mr. Russell now lived in another state and was to subject to personal jurisdiction in Florida. The procedure used by the Miami Herald effectively allows one private entity to sue another in a criminal court. This suggests that we may be overly generous in granting standing to an outsider in a criminal case when the criminal court has lost jurisdiction over the accused.

Procedurally, it might be more appropriate to require an action for declaratory relief in which the paper sued Mr. Russell and the state.

§ 901.33, Fla. Stat. (1979):

901.33 Arrest records; expunging; exceptions. – If a person who has never previously been convicted of a criminal offense or municipal ordinance violation is charged with a violation of a municipal ordinance or a felony or misdemeanor, but is acquitted or released without being adjudicated guilty, he may file a motion with the court wherein the charge was brought to expunge the record of arrest from the official records of the arresting authority. Notice of such motion shall be served upon the prosecuting authority charged with the duty of prosecuting the offense and upon the arresting authority. The court shall issue an order to expunge all official records relating to such arrest, indictment or information, trial, and dismissal or discharge. However, the court shall require that nonpublic records be retained by the Department of Law Enforcement and be made available by said department only to law enforcement agencies in the event of future investigation of said person relative to a pending charge, indictment, or information against or upon said person for an act which, if committed, would be an offense similar in nature to the offense for which said person had been charged and not found guilty. The court shall not enter an order expunging the records as above provided when there are several acts, or said person has been charged with several offenses originating out of or related to the offense or offenses for which such person had been charged and not found guilty, and when the charge and adjudication of nonguilt did not include all such charges or all such several acts. The effect of such order shall be to restore such person, in the contemplation of the law, to the status he occupied before such

arrest or indictment or information. No person as to whom such order has been entered shall be held thereafter under any provision of Florida law to be guilty of perjury or otherwise giving a false statement by reason of his failure to recite or acknowledge such arrest in response to any nonjudicial inquiry made of him for any purpose.

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§ 943.058, Fla. Stat. (Supp. 1980):

943.058 Criminal history record expunction or sealing. –

(1) Notwithstanding statutes dealing more generally with the preservation and destruction of public records, the Department of Law Enforcement, in consultation with the Department of State, may provide, by rule adopted pursuant to chapter 120, for the administrative expunction of any nonjudicial record of arrest made contrary to law or by mistake or when the record no longer serves a useful purpose.

(2) The courts of this state shall continue to have jurisdiction over their own procedures, including the keeping, sealing, expunction, or correction of judicial records containing criminal history information. The courts may order the sealing or expunction of any other criminal history record provided:

(a) The person who is the subject of the record has never previously been adjudicated guilty of a criminal offense or comparable ordinance violation;

(b) The person who is the subject of the record has not been adjudicated guilty of any of the charges stemming from the arrest or alleged criminal activity to which the records expunction petition pertains;

(c) The person who is the subject of the record has not secured a prior records expunction or sealing under this section, former s. 893.14, or former s. 901.33; and

(d) Such record has been sealed under this section, former s. 893.14, or former s. 901.33 for at least 10 years; except that, this condition shall not apply in any instance in which an indictment or information was not filed against the person who is the subject of the record.

(3) Notwithstanding subsection (2), criminal history records maintained by the Department of Law Enforcement may be ordered expunged only upon a specific finding by a circuit court of unusual circumstances requiring the exercise of the extraordinary equitable powers of the court. Upon a finding that the criteria set out in paragraphs (2)(a)-(c) have been met, the records maintained by the department may be ordered sealed by any court of competent jurisdiction; and thereafter such records and other records sealed pursuant to this section, former s. 893.14, former s. 901.33, or similar laws, shall be nonpublic records, available only to the subject, his attorney, or to criminal justice agencies for their respective criminal justice purposes. An order sealing criminal history records pursuant to this subsection shall not be construed to require that the records be surrendered to the court, and such records shall continue to be maintained by the department.

(4) In judicial proceedings under subsections (2) and (3), it shall not be necessary to make any agency other than the state a party. The appropriate state attorney shall be served with the petition and shall respond after a review of the petitioner's entire multistate criminal history record. If relief is granted, the clerk of the court shall certify copies of the order to the prosecutor and to the arresting agency. The arresting agency shall be responsible for forwarding the order to the Department of Law Enforcement and to any other agency to which the arresting agency itself disseminated the criminal history record information within the purview of the order. The Department of Law Enforcement shall forward the order to all agencies, including the Federal Bureau of Investigation, to which it disseminated the affected criminal history information. The clerk of the court shall certify a copy of the order to any other agency which the records of the clerk reflect has received the affected criminal history information from the court. A notation indicating compliance with an order to expunge may be retained for use thereafter only to confirm the expunction upon inquiry of the ordering court.

(5) Notwithstanding other laws to the contrary, a criminal justice agency may honor laws, court orders, and official requests of other jurisdictions relating to expunction, sealing, correction, or confidential handling of criminal history records of information derived therefrom.

(6) The effect of expunction or sealing of criminal history records under this section or other provisions of law, including former ss. 893.14 and 901.33, shall be as follows:

(a) When all criminal history records, including the records maintained by the Department of Law Enforcement and the courts, have been expunged, the subject of such records shall be restored, in the full and unreserved contemplation of the law, to the status occupied before the arrest, indictment, information, or judicial proceedings covered by the expunged record.

(b) When all criminal history records, except for records retained under seal by the courts or the Department of Law enforcement, have been expunged, the subject of such records may lawfully deny or fail to acknowledge the events covered by the expunged or sealed records, except in the following circumstances:

1. When the person who is the subject of the record is a candidate for employment with a criminal justice agency;

2. When the person who is the subject of the record is a defendant in a criminal prosecution;

3. When the person who is the subject of the record subsequently petitions for relief under this section; or

4. When the person who is the subject of the record is a candidate for admission to The Florida Bar.

The courts or the Department of Law Enforcement may refer to and disseminate information contained in sealed records in any of these circumstances. Subject to the exceptions stated herein, no person as to whom an expunction or sealing has been accomplished shall be held thereafter under any provision of law of this state to be guilty of perjury or to be otherwise liable for giving a false statement by reason of such person's failure to recite

or acknowledge expunged or sealed criminal history records.

(7) An order or request to expunge or seal a criminal history record shall be deemed an order or request to seek the expunction or sealing of such record by all other agencies and persons known to have received it.

(8) Each petition to a court for sealing or expunction of criminal history records shall be complete only when accompanied by the petitioner's sworn statement that, to the best of his knowledge and belief, he is eligible for such a sealing or expunction.

Rule 3.692. Motion to Expunge

(a) All relief sought by reason of Section 901.33 and Section 893.14(2), Florida Statutes (1975), shall be by motion in writing, filed with the clerk. Such motion shall state the grounds upon which it is based and the official records to which it is directed and shall be supported by an affidavit of the party seeking relief which affidavit shall state with particularity the statutory grounds and the facts in support of such motion. A copy of the motion and affidavit shall be served upon the prosecuting attorney and upon the arresting authority. Notice and hearing shall be as provided in Rule 3.590(c).

(b) The State may traverse or demur to such motion and affidavit. The court may receive evidence on any issue of fact necessary to the decision of the motion.

(c) If the motion is granted the court shall enter its order in writing so stating and further setting forth the records and agencies or departments to which it is directed.

(d) Upon the receipt of such order the clerk shall furnish a certified copy thereof to each agency or department named therein excepting the court.

(e) In regard to the official records of the court including the court file of the cause, the clerk shall:

(1) Remove from the official records of the court, excepting the court file, all entries and records subject to such order; provided that if it shall not be practical to remove such entries and records then to make certified copies thereof and thereafter expunge by appropriate means such original entries and records.

(2) Seal such entries and records, or certified copies thereof, together with the court file and retain the same in a non-public index subject to further order of the court. [See: Johnson v. State, 336 So.2d 93 (Fla.1976).]

(3) In multi-defendant cases the clerk shall make a certified copy of the contents of the court file which shall be sealed pursuant to subsection (2). Thereafter all references to the movant shall be expunged from the original court file.

(f) In regard to the official records of all agencies or departments named in such order, excepting the court, the head of such agency or department shall cause the official records thereof and which are subject of said

order to be sealed in a manner consistent with subdivision (e) of this rule.

(g) All costs of certified copies involved herein shall be borne by the movant, unless he be indigent.

Adopted Feb. 10, 1977, effective July 1, 1977 (343 So.2d 1247).

Rule 3.692. Petition to Seal or Expunge

(a) All relief sought by reason of Section 943.058, Florida Statutes (1981), shall be by petition in writing, filed with the clerk. Such petition shall state the grounds upon which it is based and the official records to which it is directed and shall be supported by an affidavit of the party seeking relief which affidavit shall state with particularity the statutory grounds and the facts in support of such motion. A copy of the petition and affidavit shall be served upon the prosecuting attorney and upon the arresting authority. Notice and hearing shall be as provided in Rule 3.590(c).

(b) The State may traverse or demur to such petition and affidavit. The court may receive evidence on any issue of fact necessary to the decision of the petition.

(c) If the petition is granted the court shall enter its order in writing so stating and further setting forth the records and agencies or departments to which it is directed.

(d) Upon the receipt of such order the clerk shall furnish a certified copy thereof to each agency or department named therein excepting the court.

(e) In regard to the official records of the court including the court file of the cause, the clerk shall:

(1) Remove from the official records of the court, excepting the court file, all entries and records subject to such order; provided that if it shall not be practical to remove such entries and records then to make certified copies thereof and thereafter expunge by appropriate names[1] such original entries and records.

(2) Seal such entries and records, or certified copies thereof, together with the court file and retain the same in a non-public index subject to further order of the court. (See: Johnson v. State, 336 So.2d 93 (Fla.1976).)

(3) In multi-defendant cases the clerk shall make a certified copy of the contents of the court file which shall be sealed pursuant to subsection (2). Thereafter all references to the petitioner shall be expunged from the original court file.

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[1] So in original court order.

Committee Note

1984 Amendment. Substantially the same as the former rule. The statutory reference in (1) was changed to cite the current statute and terminology was changed accordingly. Subsection (f) of the former rule was deleted since it dealt with substantive matters covered by Section 943.058 of the Florida Statues (1981).

(f) All costs of certified copies involved herein shall be borne by the movant, unless he be indigent. Added Feb. 10, 1977, effective July 1, 1977 (343 So.2d 1247). amended Nov. 29, 1984, effective Jan. 1, 1985 (462 So.2d 386).

Rule 3.989. Petition and Order to Expunge or Seal and Affidavit – Forms

IN THE ___ COURT
OF THE ___ JUDICIAL
CIRCUIT, IN AND
FOR ___ COUNTY,
FLORIDA

CASE NO. _____
DIVISION _____

STATE OF FLORIDA,)
Plaintiff,)
vs.)
_____,)
Defendant.)

AFFIDAVIT

STATE OF FLORIDA
COUNTY OF

I, ___, am the Defendant in the above-styled cause and I do hereby swear and affirm that I have never been adjudicated guilty of a criminal offense or a comparable ordinance violation and I have frankly discussed this

with my counsel in depth and he has explained to me the meaning of all of the terms in this Affidavit.

1. That I was arrested on the ___ day of ___, 19___, by ___, and I have not been adjudicated guilty of the charges stemming from that arrest or the alleged criminal activity surrounding my arrest.

2. That I have never secured a prior records expunction or sealing under any law.

3. (For use in expungement Petitions only.) That my records of arrest for this date has been sealed for ten (10) years or an indictment or information was not filed against me for the above criminal transaction.

_____
Defendant/Petitioner

Sworn to and subscribed
before me this ___ day
of ___, 19___.
Notary Public
My Commission Expires:

IN THE ___ COURT
OF THE ___ JUDICIAL
CIRCUIT, IN AND
FOR ___ COUNTY,
FLORIDA

CASE NO. _____
DIVISION _____

ORDER TO EXPUNGE PURSUANT TO FLORIDA STATUTE 943.058 AND FRCP 3.692

THIS CAUSE having come on to be heard before me this date upon the Defendant's Petition to Expunge certain records of the Defendant's arrest on the ___ day of

(___, 19___, by ___ (arresting agency), for ___ (charges), and the Court having heard argument of counsel and being otherwise fully advised in the premises, hereby finds:

1. That the Defendant has never previously been adjudicated guilty of a criminal offense or a comparable ordinance violation.

2. That the Defendant was not adjudicated guilty of charges stemming from the arrest or criminal activity to which this expunction Petition pertains.

3. That the Defendant has not secured a prior records expunction or sealing.

4. That this record has either been sealed for at least ten (10) years or no indictment or information was ever filed in this case against the Defendant; whereupon it is thereby

ORDERED AND ADJUDGED that said Petition to Expunge is hereby granted. All Court records pertaining to the above-styled case shall be expunged in accordance with the procedures set forth in Florida Statute 943.058 and FRCP 3.692; and it is further

ORDERED AND ADJUDGED that the Clerk of this Court shall forward a certified copy of this Order to the State Attorney, ——— (arresting agency), and the Sheriff of ——— County, who will comply with the procedures set forth in Florida Statute 943.058 and appropriate regulations of the Department of Law Enforcement, and who will further forward a copy of this Order to any agency that their records reflect has received the instant criminal history record information; and it is further

ORDERED AND ADJUDGED that ——— (arresting agency) shall expunge all information concerning indicia of arrest or criminal history record information reference this Defendant in accordance with the procedures set forth in Florida Statute 943.058 and FRCP 3.692.

All costs of certified copies involved herein are to be borne by the Petitioner.

DONE AND ORDERED in Chambers at ——— County, Florida, this ___ day of ___, 19___.

_____
Circuit Court Judge

IN THE ___ COURT
OF THE ___ JUDICIAL
CIRCUIT, IN AND
FOR ___ COUNTY,
FLORIDA

CASE NO. _____
DIVISION _____

ORDER TO SEAL RECORDS PURSUANT TO FLORIDA STATUTE 943.058 AND FRCP 3.692

THIS CAUSE having come on to be heard before me this date upon Defendant's Petition to Seal Records concerning the arrest on the ___ day of ___, 19___, by the ———, and the Court having heard argument of counsel and being otherwise advised in the premises, hereby finds:

1. That the Defendant has never been previously adjudicated guilty of a criminal offense or comparable ordinance violation.

2. That the Defendant was not adjudicated guilty of charges stemming from the arrest or criminal activity to which the instant Petition pertains.

3. That the Defendant has not secured a prior records expunction or sealing; whereupon it is thereby

ORDERED AND ADJUDGED that the Petition to Seal Records be and the same hereby is granted. All Court records pertaining to the above-styled case shall be sealed in accordance with the procedures set forth in Florida Statute 943.058 and FRCP 3.692; and it is further

ORDERED AND ADJUDGED that the Clerk of this Court shall forward a certified copy of this Order to the State Attorney, ——— (arresting agency), and the Sheriff of ——— County, who will comply with the procedures set forth in Florida Statute 943.058 and appropriate regulations of the Department of Law Enforcement, and who will further forward a copy of this Order to any agency that their records reflect has received the instant criminal history record information; and it is further

ORDERED AND ADJUDGED that ——— (arresting agency) shall seal all information concerning indicia of arrest or criminal history record information reference this Defendant in accordance with the procedures set forth in Florida Statute 943.058 and FRCP 3.692.

All costs of certified copies involved herein are to be borne by the Petitioner.

DONE AND ORDERED in Chambers at ——— County, Florida, this ___ day of ___, 19___

_____

Circuit Court Judge

IN THE ___ COURT
OF THE ___ JUDICIAL
CIRCUIT, IN AND
FOR ___ COUNTY,
FLORIDA

CASE NO. _____
DIVISION _____

STATE OF FLORIDA,
Plaintiff
vs.
_____,
Defendant,

PETITION TO EXPUNGE OR SEAL

COMES NOW the Defendant, ———, by and through his undersigned attorney, and petitions this Honorable Court, pursuant to Florida Rule of Criminal Procedure 3.692, and Florida Statute 943.058, to expunge/seal all criminal history record information concerning his arrest on the ___ day of ___, 19___, by ——— (arresting agency), for ——— (charges), and as grounds therefore would show:

1. that on the ___ day of ___, 19___, the Defendant, ———, a ___ (race/sex), whose date of birth is ———, was arrested by ———, and charged with ———.

2. That the Defendant has not been adjudicated guilty of any of the charges stemming from this arrest or alleged criminal activity.

3. That the Defendant has not secured a prior records expunction or sealing under this Section, former Section 893.14 or former Section 901.33

4. (To be used only when requesting expunction.) Such record has been sealed under this Section, former Section 893.14 or former Section 901.33 for at least ten (10) years or there has not been an indictment or information filed against the Defendant who is the subject of this criminal history record information.

WHEREFORE, the Defendant, ———, moves this Honorable Court to expunge/seal any criminal history record information reference his arrest by ——— (arresting agency), for ——— (charges), on the ___ day of ___, 19 ___.

I HEREBY CERTIFY that a true and correct copy of the foregoing pleading has been served upon ___, State Attorney for the ___ Judicial Circuit, in and for ——— County, ——— (arresting agency), and ——— (Sheriff of County where Defendant was arrested, if different), this ___ day of ___, 19___.

_____

Name:
Address:
City/State:
Telephone Number:

Added Nov. 29, 1984, effective Jan. 1, 1985 (462 So.2d 386).

Committee Note

1984 Adoption. In order to have uniformity throughout the State, the committee proposes these forms

for Petition to Expunge or Seal, Order to Seal and Order to Expunge and Affidavit. These also should be a great asset to counsel and an invaluable asset to the clerks and FDLE, etc., who will be receiving Orders in the future. The subcommittee working on these proposed forms has contacted law enforcement agencies, clerks, etc., for their input as to these proposed forms.
